Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

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This issue contains

THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

The abstracts, rulings, and notices which are issued weekly by the U.S. Customs Service are subject to correction for typographical or other printing errors. Users may notify the U.S. Customs Service, Logistics Management Division, Washington, D.C. 20229, of any such errors in order that corrections may be made before the bound volumes are published.

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U.S. Customs Service

Treasury Decisions

(T.D. 83-231)

Reimbursable Services—Excess Cost of Preclearance Operations

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 2, 1983.

Notice is hereby given that pursuant to Section 24.18(d), Customs Regulations (19 CFR 24.18(d)), the biweekly reimbursable excess costs for each preclearance installation are determined to be as set forth below and will be effective with the pay period beginning November 13, 1983.

Installation	Biweekly excess cost
Montreal, Canada	$20,727
Toronto, Canada	37,208
Kindley Field, Bermuda	6,196
Nassau, Bahama Islands	19,067
Vancouver, Canada	15,011
Winnipeg, Canada	3,085
Freeport, Bahama Islands	8,520
Calgary, Canada	8,340
Edmonton, Canada	5,853

JOHN L. HEISS,
Acting Comptroller.

19 CFR Part 111

(T.D. 83-232)

Change of Policy Relating to Customhouse Brokers' Charges for Incidental Services

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Change of policy.

SUMMARY: This document changes, for one year, Customs policy with regard to the results of a failure by a customhouse broker to provide a client an intemized accounting of the cost of any incidential service the broker may arrange for the client. Formerly, any variance between the amounts actually expended for these items and the broker's statement to his client which was not fully explained in the records required to be maintained by the broker for Customs inspection and audit, as well as the reasonableness of the variance, was considered to be an improper withholding from the client of information relating to Customs business and a failure to keep complete records. Under this policy change, Customs will no longer routinely inquire into the reasonableness of the charges for incidental services arranged by a broker for a client. As noted above, the policy change will be effective for one year, after which Customs will evaluate its experience under the modified policy and decide whether to make the policy change permanent. The public is requested to submit any applicable comments to Customs during that year. Those comments will be considered before a final decision in the matter is made. The change in policy is being made in order to narrow Customs role regarding brokers to those activities which are exclusively Customs-related. In addition, the change will permit Customs to utilize its limited resources more effectively. For Customs to attempt to penetrate modern day business relationships between broker and client, compounded by current day technologically advanced automated accounting systems, is not considered an effective and efficient utilization of its limited resources. Finally, the change in policy is consistent with the Administration's posture concerning governmental regulation of private business transactions.

EFFECTIVE DATE: The policy change is effective November 8, 1983. Public comment on the change must be received on or before (one year from date of publication in the Federal Register).

ADDRESS: Written comments (preferably in triplicate) should be addressed to the Commissioner of Customs, Attention: Regulations Control Branch, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Raymond F. Mulhern, Regulatory Audit Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229 (202-566-2812).

SUPPLEMENTARY INFORMATION:

BACKGROUND

A "customhouse broker" is licensed by the Customs Service to transact Customs business on behalf of his clients. The Customs Service is authorized by section 641, Tariff Act of 1930, as amended (19 U.S.C. 1641), and Part 111, Customs Regulations (19 CFR Part 111), to license brokers and supervise their activities.

A broker's bill to his client often includes charges for "incidential services", such as freight, storage, cartage, cooperage, dock and messenger service, insurance, or bonds, which are arranged by the broker on behalf of his client.

These incidential services are in addition to the primary Customs-related function of entry documentation and duty payment performed by brokers for their clients.

CURRENT POLICY: TREASURY DECISIONS 78-308

Under Treasury Decision 78-308, published in the Federal Register on a September 15, 1978 (43 FR 41192), the records maintained by brokers for Customs inspection and audit, are required to set forth an itemized accounting of the costs incurred by them for incidential services. Customs reviews those records and makes limited inquiries into the reasonableness of such charges billed by brokers to their clients only in cases in which:

1. The difference between the cost of an incidental service to the broker and the amount billed to the client has not been identified (itemized) separately on billings to the client; or

2. The client has not been provided, in advance of importation, with a written itemized quotation of the charges for the incidental service, following which the client has authorized the broker to handle the importation.

If a broker is unable to justify, in either of the above cases, substantial or "unreasonable" differences in billings between clients for like services, based on normal, accepted business practices, such as volume discounts, special circumstances, or the like, those differences would constitute a discrepancy. District directors of Customs, after a determination that a charge is unreasonable, are required to notify the broker of the apparent discrepancy and recommend an appropriate change. Differences between costs incurred by a broker for incidential services and amounts billed to clients for such services which are not itemized in the broker's records, constitute a failure to keep complete records (see sections 111.21 and 111.22, Customs Regulations (19 CFR 111.12, 111.22)).

Reasons for Change in Policy

Customs has determined that a policy change is necessary because the relationship between a broker and client in regard to acceptance of charges is inherently the responsibility of the client acting as a normal prudent businessman. The change in policy is being made in order to narrow Customs role regarding brokers to those activities which are exclusively Customs-related, and will permit Customs to utilize its limited resources more effectively.

Accordingly, Customs will continue to require that brokers maintain as part of their records of Customs transactions available for Customs inspection and audit, an itemized accounting of the costs incurred by them for incidential services. However, Customs now will inquire into the reasonableness of a charge for an incidential service that a broker bills his client only when a specific complaint about a charge is received from a broker's client, or in those cases where Customs believes that an inquiry is necessary to substantiate or disapprove an allegation (whether of a specific or general nature) or a belief of possible misconduct on the part of a broker.

Change of Policy

Brokers shall continue to maintain for Customs inspection records of the costs incurred by them for "incidential services", such as freight, storage, cartage, cooperage, dock and messenger service, insurance, or bonds, arranged by the brokers for their clients, for which the brokers bill the clients. However, Customs will inquire into the reasonableness of brokers' charges to their clients for an incidental service only when (1) a complaint of unreasonableness about a specific charge is received from a broker's client, or (2) an inquiry is considered by Customs to be necessary to substantiate or disapprove an allegation (whether of a specific or general nature) of a belief of possible misconduct on the part of a broker.

This change of policy will be effective for one year, during which Customs invites public comment on the change. At the end of the period, Customs will consider any written comments received and evaluate its experience under the policy change in accord with the criteria listed below before deciding whether to make the change permanent. The criteria that will be used to evaluate the policy change will include, but are not limited to, the following:

1. Number of complaints received from the public during the one year period;

2. Results of inquiries performed as a direct consequence of the complaints received;

3. Public comments received during the one year period; and

4. Results of audits performed of selected brokers to determine the degree of cost impact to the importing public. The degree of cost impact will be based on billed amounts for incidental services

during the test period as opposed to billed amounts during the preceding year.

COMMENTS

Before making this policy change permanent, consideration will be given to any written comments timely submitted to the Commissioner of Customs. Comments submitted will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington D.C. 20229.

AUTHORITY

This policy change is made under the authority of R.S. 251, as amended, secs. 624, 641, 46 Stat. 759, as amended (5 U.S.C. 301; 19 U.S.C. 66, 1624, 1641).

EXECUTIVE ORDER 12291

The change of policy does not meet the criteria for a "major rule" as specified in section 1(b) of E.O. 12291. Therefore, no regulatory impact analysis has been prepared.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE

Because the document is a general statement of policy, it has been determined that pursuant to 5 U.S.C. 553 (b)(A) and (d)(2), the notice and delayed effective date provisions of 5 U.S.C. 553 (b) and (d) are not applicable.

LIST OF SUBJECTS IN 19 CFR PART 111

Administrative practice and procedure, Brokers, Customs duties and inspection.

DRAFTING INFORMATION

The principal authors of this document were Raymond F. Mulhern, Regulatory Audit Division, and Todd J. Schneider, Regulations Control Branch, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: September 6, 1983.

WILLIAM VON RAAB.
Commissioner of Customs.

[Published in the Federal Register, November 8, 1983 (48 FR 51288)]

(T.D. 83-233)

Bonds

Approval and discontinuance of Carrier's Bonds, Customs Form 3587

Bonds of carriers for the transportation of bonded merchandise have been approved or discontinued as shown below. The symbol "D" indicates that the bond previously outstanding has been discontinued on the month, day, and year represented by the figures which follow. "PB" refers to a previous bond, dated as represented by figures in parentheses immediately following, which has been discontinued. If the previous bond was in the name of a different company or if the surety was different, the information is shown in a footnote at the end of the list.

Dated: November 2, 1983.

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Ace-Doran Hauling and Rigging Co., 1601 Blue Rock St., Cincinnati, OH; motor carrier; Aetna Casualty and Surety Co. (PB 10/1/81) D10/25/83 [1]	Oct. 1, 1983	Oct. 25, 1983	Cleveland, OH $100,000
Action Transit Co., P.O. Box 884, Mooresville, NC; motor carrier; The Hanover Ins. Co.	Aug. 26, 1983	Oct. 6, 1983	New Orleans, LA $25,000
Adcor Trucking, Inc., 2400 Air Park Rd., North Charleston, SC; motor carrier; Fidelity and Deposit Co. of MD	Sept. 1, 1983	Sept. 19, 1983	Charleston, SC $50,000
American Freight System, Inc., 9393 W. 110th St., Overland Park, KS; motor carrier; Safeco Ins. Co. of America (PB 8/29/79) D 10/3/83 [2]	Aug. 29, 1983	Oct. 3, 1983	Chicago, IL $30,000
Arrow Express, Inc., 2043 Airport Dr., Austin Straubel Field, Green Bay, WI; motor carrier; U.S. Fidelity & Guaranty Co. D 11/1/83	Aug. 17, 1982	Oct. 14, 1982	Milwaukee, WI $25,000
Arrow Trucking Co., P.O. Box 7280, Tulsa, OK; motor carrier; The Aetna Casualty & Surety Co. (PB 5/6/76) D 9/23/83 [3]	Sept. 21, 1983	Sept. 23, 1983	Houston, TX $25,000
J. C. Bangerter & Sons, Inc., 1265 North Main, Bountiful, UT; motor carrier; Commercial Union Ins. Co. D 9/16/83	July 28, 1981	Sept. 11, 1981	San Francisco, CA $25,000
W. L. Bartley, Inc., Greenville, ME; motor carrier; St. Paul Fire & Marine Ins. Co.	Aug. 3, 1983	Sept. 19, 1983	St. Albans, VT $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Bay Transportation Co., Inc. and/or Georgia, Florida, Alabama Transportation Co., Inc., 1541 Reeves St., Dothan, AL; motor carrier; National Surety Corp. (PB 4/19/77) D 9/4/83 [4]	Apr. 19, 1983	Sept. 5, 1983	Mobile, AL $25,000
Briggs Transportation Co., 2785 North Fairview Ave., St. Paul, MN; motor carrier; Continental Western Ins. Co.	Sept. 7, 1983	Oct. 3, 1983	Minneapolis, MN $25,000
C & J Commercial Driveaway Co., Inc., 30800 Telegraph Rd.; Suite 4900, Birmingham, MI; motor carrier; American Casualty Co. of Reading, PA (PB 10/12/77) D 10/12/83 [5]	Sept. 6, 1983	Oct. 14, 1983	Detroit, MI $25,000
CRST, Inc., 3930 16th Ave., Cedar Rapids, IA; motor carrier; The Travelers Indemnity Co.	Sept. 15, 1982	Sept. 29, 1983	Chicago, IL $25,000
Camion's Inc., 744 Forestdale Blvd., Birmingham, AL; motor carrier; Employers Ins. of Wausau, a Mutual Co.	Sept. 1, 1983	Sept. 26, 1983	Mobile, AL $25,000
Canadian Pacific Transport (US) Ltd., 150 Commissioners St., Toronto, Ontario, Canada; motor carrier; The Continental Ins. Co. (PB 2/18/82) D 10/10/83 [6]	Feb. 18, 1983	Oct. 11, 1983	Ogdensburg, NY $200,000
Cast North America '83 (Trucking) Ltd., 5500 Notre Dame West, Montreal, Quebec, Canada; motor carrier; Fireman's Fund Ins. Co.	Sept. 26, 1983	Oct. 17, 1983	Ogdensburg, NY $50,000
John D. Collier, P.O. Box 16873, San Antonio, TX; motor carrier; Lawyers Surety Corp.	Aug. 5, 1983	Sept. 14, 1983	Laredo, TX $25,000
Columbia Van Lines Inc., 631 S. Pickett St., Alexandria, VA; motor carrier; Mid-Century Ins. Co. D 8/3/82	Jan. 6, 1972	Jan. 18, 1972	Baltimore, MD $25,000
Consolidated Transportation Systems, Inc., 1700 S. Highland Ave., P.O. Box 25658, Baltimore, MD; motor carrier; Ins. Co. of North America	Sept. 13, 1983	Sept. 14, 1983	Baltimore, MD $25,000
Constable Transport Limited, 650 Allanburg Rd., Thorold, Ontario, Canada; motor carrier; Royal Ins. Co. of America (PB 7/9/68) D 9/13/83 [7]	Aug. 1, 1983	Sept. 13, 1983	Buffalo, NY $25,000
Dalor Transit Inc., 5601 W. Ryan Rd., Franklin, WI; motor carrier; The North River Ins. Co.	Aug. 25, 1983	Sept. 26, 1983	Milwaukee, WI $25,000
Francisco A. Delgado, Inc., Box 7466, Ponce, PR; motor carrier; Insurance Co. of North America (PB 8/23/82) D 9/24/83	July 1, 1983	Sept. 24, 1983	San Juan, PR $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Robert W. Denton, d/b/a Spirit Trucking, 8700 S. Wolf Rd., Hinsdale, IL; motor carrier; Great American Ins. Co.	Oct. 18, 1983	Oct. 18, 1983	Chicago, IL $35,000
Eagle Trucking Co., P.O. Box 471, Kilgore, TX; motor carrier; Trinity Universal Ins. Co. D 10/4/83	Feb. 24, 1982	Feb. 25, 1982	Houston, TX $25,000
Ellex Transportation, Inc., P.O. Box 9637, Tulsa, OK; motor carrier; The Aetna Casualty & Surety Co. D 9/27/83	Jan. 18, 1983	March 1, 1983	Houston, TX $50,000
Expedited Air Service, Inc., P.O. Box 40, Cudahy, WI; motor carrier; The Continental Ins. Co. D 10/8/83	July 28, 1982	Oct. 1, 1982	Milwaukee, WI $25,000
Flex-Mor Industries Ltd., Bolton, Ontario, Canada; motor carrier; Old Republic Ins. Co.	Oct. 20, 1983	Oct. 21, 1983	Buffalo, NY $40,000
Georgia, Florida, Alabama Transportation Co., Inc.—see Bay Transportation Co., Inc.			
Getter Trucking Inc., P.O. Box 1635, Billings, MT; motor carrier; Safeco Ins. Co. of America	Sept. 12, 1983	Sept. 27, 1983	Great Falls, MT $25,000
Go Transport & Delivery Service, Inc., 6405 LaPort Rd., Houston, TX; motor carrier; St. Paul Fire & Marine Ins. Co/ D 10/4/83	Oct. 15, 1981	Oct. 29, 1981	Houston, TX $50,000
Great Western Airlines, Inc., Route 5, Riverside Airport, Tulsa, OK; air carrier; St. Paul Fire & Marine Ins. Co. D 10/11/83	Dec. 9, 1977	Jan. 4, 1978	Chicago, IL $25,000
H.M.D. Transport, Inc., 370 West First St., South Boston, MA; motor carrier; Peerless Ins. Co. D 10/3/83	Jan. 11, 1982	July 13, 1982	Boston, MA $25,000
Hockersmith & Sons, Inc., d/b/a Hockersmith Transportation Services, 230 North West F. St., P.O. Box 1740, Richmond, IN; motor carrier; Union Indemnity Ins. Co. of NY (PB 11/1/82) D 9/30/83 [8]	Sept. 21, 1983	Sept. 30, 1983	Cleveland, OH $50,000
Hockersmith Transportation Services—see Hockersmith & Sons, Inc.			
Z. H. Hurt Enterprises d/b/a Mex-Cal Truckline, 1840 Harrison St., National City, CA; motor carrier; Washington International Ins. Co.	Sept. 22, 1983	Oct. 7, 1983	San Diego, CA $50,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Indianhead Truck Line, Inc., 1947 West County Road C., St. Paul, MN; motor carrier; Northwestern National Ins. Co. of Milwaukee, WI (PB 10/4/80) D 10/4/83 [9]	Oct. 4, 1983	Oct. 4, 1983	Minneapolis, MN $35,000
Inland Transport Int'l Inc., 2089 E. Willow St., Signal Hill, CA; motor carrier; United States Fidelity & Guaranty Co.	Sept. 22, 1983	Oct. 20, 1983	Los Angeles, CA $50,000
Interstate Carriers Co-op, 3603 N. Main St., Fort Worth, TX; motor carrier; Peerless Ins. Co. D 10/4/83	July 23, 1975	Nov. 11, 1975	Houston, TX $50,000
Jay Lines, Inc., P.O. Box 61467, DFW Airport, TX; motor carrier; St. Paul Fire & Marine Ins. Co. (PB 1/5/81) D 8/2/83 [10]	Nov. 1, 1982	Sept. 7, 1983	New Orleans, LA $25,000
Jet Services, Inc., 1946 S. First St., Milwaukee, WI; motor carrier; Continental Ins. Co. D 11/6/83	July 1, 1980	Aug. 6, 1980	Milwaukee, WI $25,000
Kartran Inc., 3310 Bobbie Lane, Garland, TX; motor carrier; St. Paul Fire & Marine Ins. Co. D 10/5/83	Jan. 7, 1981	Jan. 7, 1981	Dallas/ Fort Worth, TX $25,000
Kenney, Inc., P.O. Box 217, Humansville, MO; motor carrier; Old Republic Ins. Co.	Sept. 14, 1983	Oct. 18, 1983	St. Louis, MO $50,000
Loop Fleet Service, Inc., 1776 North Commerce St., Milwaukee, WI; motor carrier; Sentry Insurance, a Mutual Co. (PB 10/22/81) D 10/22/83 [11]	Aug. 15, 1983	Oct. 23, 1983	Milwaukee, WI $25,000
M & M Drayage, Inc., P.O. Box 15897, Houston, TX; motor carrier; Trinity Universal Ins. Co.	July 29, 1983	Sept. 12, 1983	Houston, TX $50,000
Toby Martin Oilfield Trucking, Inc., P.O. Box PP, Crosby, TX; motor carrier; Washington International Ins. Co. D 10/4/83	Nov. 3, 1980	Nov. 4, 1980	Houston, TX $25,000
Mayfield Transfer Co., Inc., 3200 W. Lake St., Melrose Park, IL; motor carrier; Safeco Ins. Co. of America	Aug. 29, 1983	Sept. 28, 1983	Chicago, IL $25,000
Merchant-Stor Dor Freight System, Inc. (an IL Corp.), 747 Third Ave., New York, NY; freight forwarder; American Motorists Ins. Co.	Sept. 2, 1983	Oct. 12, 1983	Chicago, IL $200,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Mex-Cal Truckline—see Z. H. Hurt Enterprises			
Millstead Van Lines, Inc., P.O. Drawer 878, Bartlesville, OK; motor carrier; St. Paul Fire & Marine Ins. Co. D 10/4/83	July 10, 1974	Oct. 29, 1974	Houston, TX $25,000
Minn-Dak Transport, Inc., South Highway 59, Pelican Rapids, MN; motor carrier; State Surety Co.	Aug. 25, 1983	Sept. 16, 1983	Duluth, MN $50,000
Mobile Express, Inc., 6000 Gum Springs Rd., Longview, TX; motor carrier; The Continental Ins. Co.	Apr. 6, 1983	Oct. 12, 1983	Houston, TX $25,000
K. G. Moore Trucking, Inc., 86 Washington St., U.S. Route #1, P.O. Box 1825, Plainville, MA; motor carrier; Washington International Ins. Co. (PB 7/29/75) D 9/28/83 [12]	Aug. 8, 1983	Sept. 28, 1983	Boston, MA $50,000
Motor Express, Inc., P.O. Box 604, Edinburg, TX; motor carrier; Washington International Ins. Co. D 10/4/83	Apr. 16, 1981	Apr. 16, 1981	Galveston, TX $25,000
Multi-Modal Transports, Inc., 121 W. McLemore; P.O. Box 16122, Memphis, TN; motor carrier; Lawyers Surety Corp.	Sept. 27, 1983	Oct. 21, 1983	New Orleans, LA $25,000
Nationwide Auto Transporters, Inc., 140 Sylvan Ave., Englewood Cliffs, NJ; motor carrier; Peerless Ins. Co. D 10/5/83	May 10, 1978	May 17, 1978	Baltimore, MD $50,000
Oehlke Truck Line, P.O. Box 151, Rosenburg, TX; motor carrier; The Aetna Casualty and Surety Co.	Sept. 15, 1983	Oct. 6, 1983	Houston, TX $25,000
P-Y Transport, Inc., 2393 W. Market St., York, PA; motor carrier; Fidelity and Deposit Co. of MD	July 14, 1983	Sept. 14, 1983	Philadelphia, PA $25,000
Pem Air Limited, RR #6, Pembrook, Pembroke Airport, Pembroke, Ontario, Canada; air carrier; Fireman's Fund Ins. Co.	Sept. 20, 1983	Oct. 5, 1983	Buffalo, NY $25,000
Port City Drayage & Port City Express, Inc., 713 Merchants National Bank Bldg., P.O. Box 23, Mobile, AL; motor carrier; Liberty Mutual Ins. Co.	Sept. 14, 1983	Sept. 29, 1983	Mobile, AL $25,000
Port City Express, Inc.—see Port City Drayage			
Pride Transport Co., P.O. Box 3237, Abilene, TX; motor carrier; National Union Fire Ins. Co. D 10/4/83	June 25, 1976	July 29, 1976	Galveston, TX $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Refrigerated Transport, Inc. of Texas, 318 Cadiz St., Dallas, TX; motor carrier; St. Paul Fire & Marine Ins. Co. D 10/4/83	Apr. 10, 1973	Apr. 25, 1973	Houston, TX $25,000
Jose E. Rios-Mulero, P.O. Box 5783, San Juan, PR; motor carrier; St. Paul Fire & Marine Ins. Co.	Sept. 1, 1983	Oct. 6, 1983	San Juan, PR $25,000
Scheduled Truckways, Inc., Sellers & O'Brien Sts., Kearny, NJ; motor carrier; Federal Ins. Co.	June 2, 1983	Sept. 23, 1983	Newark, NJ $50,000
Smith Hardware Inc. d/b/a Smith Oil Co., Main St., Jackman, ME; motor carrier; St. Paul Fire & Marine Ins. Co.	Oct. 3, 1983	Oct. 13, 1983	St. Albans, VT $25,000
Smith Oil Co.—see Smith Hardware Inc.			
Spirit Trucking—see Robert W. Denton			
States Marine Corporation of Delaware, 90 Broad St., New York, NY; motor carrier; Ins. Co. of North America D 10/4/83	Nov. 10, 1950	Nov. 16, 1950	Galveston, TX $25,000
Jimmy Stein Motor Lines, Inc., P.O. Box 2286, Mobile, AL; motor carrier; Reliance Ins. Co.	Sept. 1, 1983	Sept. 20, 1983	Mobile, AL $25,000
Stevens Transport, 3020 E. Highway 80, Mesquite, TX; motor carrier; United States Fire Ins. Co. (PB 10/8/80) D 10/8/83 [13]	Oct. 8, 1983	Oct. 8, 1983	Dallas/Fort Worth, TX $25,000
Suburban Motor Freight, Inc., 1100 King Ave., Columbus, OH; motor carrier; United States Fidelity & Guaranty Co. (PB 8/23/72) D 10/4/83 [14]	Aug. 23, 1983	Oct. 4, 1983	Detroit, MI $50,000
Sun Devil Air Freight, Inc., 2050 East University Dr., Phoenix, AZ; motor carrier; Continental Ins. Co.	Sept. 16, 1983	Sept. 26, 1983	Nogales, AZ $25,000
Transport McNeill-McGrath Inc., 2525 St. Clair Ave. West, Toronto, Ontario, Canada; motor carrier; St. Paul Fire & Marine Ins. Co.	Sept. 1, 1983	Sept. 26, 1983	Buffalo, NY $25,000
Trucker's Inc., 4316 S. Main St., Stafford, TX; motor carrier; National Surety Corp. D 10/4/83	Apr. 25, 1979	May 18, 1979	Houston, TX $25,000
United Brands Co., P.O. Box 62, Galveston, TX; motor carrier; American Home Assurance Co. of NY D 9/14/83	Jan. 21, 1977	Mar. 16, 1977	Galveston, TX $25,000

Name of principal and surety	Date of bond	Date of approval	Filed with district director/area director/amount
Ralph Walker Inc., P.O. Box 3222, Jackson, MS; 625 Old Hwy 49S, Richland, MS; motor carrier; Western Surety Co.	Sept. 26, 1983	Oct. 20, 1983	New Orleans, LA $25,000
Western Lines, Inc., P.O. Box 1145, Houston, TX; motor carrier; United States Fidelity & Guaranty Co. D 10/4/83	May 1, 1980	July 16, 1980	Houston, TX $50,000
White Star Trucking Inc., 1750 Southfield Rd., Lincoln Park, MI; motor carrier; The Ohio Casualty Ins. Co. (PB 8/3/72) D 9/23/83 [15]	Aug. 24, 1983	Sept. 23, 1983	Detroit, MI $50,000
Wilson Moving & Storage Co., Inc., 885 Bailey Ave., Buffalo, NY; motor carrier; St. Paul Fire & Marine Ins. Co.	Sept. 6, 1983	Oct. 3, 1983	Buffalo, NY $40,000
Worster Motor Lines, P.O. Box 110, North East, PA; motor carrier; Washington International Ins. Co. (PB 3/2/83) D 10/6/83 [16]	Oct. 6, 1983	Oct. 12, 1983	Buffalo, NY $25,000

[1] Surety is United States Fidelity & Guaranty Co.
[2] Surety is American Casualty Co. of Reading, PA.
[3] Surety is St. Paul Fire & Marine Ins. Co.
[4] Principal is Bay Transportation Co., Inc.
[5] Principal is C & J Commercial Driveaway, Inc. Surety is Aetna Casualty & Surety Co.
[6] Principal is Smith Transport (US) Ltd.
[7] Surety is Globe Indemnity Co.
[8] Principal is Hockersmith & Sons, Inc. d/b/a Hockersmith Air Freight.
[9] Surety is Insurance Co. of North America.
[10] Surety is National Surety Corp.
[11] Surety is The Ohio Casualty Ins. Co.
[12] Principal is K. G. Moore, Inc. Surety is American Employers' Inc. Co.
[13] Surety is Transamerica Ins. Co.
[14] Surety is Hartford Accident and Indemnity Co.
[15] Surety is Fidelity & Deposit Co. of MD.
[16] Principal is Worster Motor Lines Inc. Surety is Protective Ins. Co.

BON-3-03

EDWARD B. GABLE, JR.,
Director,
Carriers, Drawback and Bonds Division.

(T.D. 83-234)

Petitioner's Desire To Contest Decision Denying Domestic Interested Party Petition Requesting Reclassification of Certain Glassware

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of petitioner's desire to contest decision on domestic interested party petition.

SUMMARY: This document advises the public of a domestic interested party's desire to contest Customs decision denying its petition

requesting reclassification of certain "specially tempered" imported glassware as "other" glassware at a higher rate of duty. The petitioner has advised Customs of its intention to file an action in the U.S. Court of International Trade.

FOR FURTHER INFORMATION CONTACT: Thomas J. Lindmeier, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202–566–2938).

SUPPLEMENTARY INFORMATION:

Background

On July 31, 1981, a petition was filed with Customs under section 516, Tariff Act of 1930, as amended (19 U.S.C. 1516), by Libbey Glass Division of Owens-Illinois, Inc. ("petitioner"), an American manufacturer of glassware. The petitioner contended that certain glassware imported by J. G. Durand International ("importer") which has been classified under the provision for glassware which is "specially tempered," in item 546.38, Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202), is not "specially tempered," and thus is properly classifiable under the provisions for "other" glassware, according to value, in items 546.52 through 546.68, TSUS.

A notice of receipt of the petition was published in the Federal Register on November 12, 1981 (46 FR 55822), advising the public of petitioner's contention and requesting comments on the petition. A notice of extension of time for comment was published in the Federal Register on December 7, 1981 (46 FR 59690). Of the 37 comments received in response to the notice, 34 expressed general approval of the petition and requested its adoption.

Decision on Petition and Notice of Petitioner's Desire To Contest

After careful analysis of the comments received in response to the notice and further review of the matter, Customs published in the Federal Register on July 25, 1983 (48 FR 33792), Treasury Decision 83–154 granting the petition in part, and denying it in part. As stated on page 33794 of that document:

> "* * * However, as to the imported glassware designated 'Artic Stemware', to include 'Champagne', 'Wine', and 'Goblet', and 'Artic Tumblers', to include 'Old Fashioned', 'Hi Ball', and 'Beverage', the petition is denied. That merchandise has been properly classified under the provision for glassware which is 'pressed and toughened (specially tempered)' in item 546.38, TSUS."

A document correcting the effective date of the decision to September 10, 1983, *i.e.,* the thirty-first day after the date of publica-

tion of the decision in the Customs Bulletin, appeared in the Federal Register on August 9, 1983 (48 FR 36238).

In response to Customs decision to deny the petition in part, the petitioner filed on August 19, 1983, a letter giving notice of its desire to contest Customs decision in accordance with section 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.23, Customs Regulations (19 CFR 175.23).

Customs has reconsidered the matter in light of petitioner's letter, but remains of the opinion that its July 25, 1983, decision is correct. That decision will stand in the absence of a contrary judgment rendered by the U.S. Court of International Trade or the U.S. Court of Appeals for the Federal Circuit.

AUTHORITY

This notice is published under the authority of section 516(c), Tariff Act of 1930, as amended (19 U.S.C. 1516(c)), and section 175.24, Customs Regulations (19 CFR 175.24).

DRAFTING INFORMATION

The principal author of this document was Todd J. Schneider, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

Dated: October 14, 1983.

WILLIAM VON RAAB,
Commissioner of Customs.

[Published in the Federal Register, November 14, 1983 (48 FR 51884)]

ERRATUM

In CUSTOMS BULLETIN, Vol. 17, No. 42, dated October 19, 1983, in T.D. 83-210, the following changes should be made:

(1) The spelling of the first air carrier should be corrected from AirPacific Ltd., to Air Pacific Ltd., and

(2) The following sentence should be added to the end of the list before the footnote:

The foregoing principals have been designated as carriers of bonded merchandise.

In CUSTOMS BULLETIN, Vol. 17, No. 43, dated October 26, 1983, in T.D. 83-214, on page 114, item 27, under the heading for § 4.96, should read "Part 4 is further amended by removing § 4.96(i) and footnotes 131 b and 132 c."

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 3, 1983.

The following are decisions made by the United States Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the Customs Bulletin.

JOHN P. SIMPSON,
Director,
Office of Regulations and Rulings.

(C.S.D. 83-99)

This ruling holds that under the subsequent proceeds provision, Section 402(b)(1)(E) of the Trade Agreements Act, royalty and license fees may not be included in transaction value of the imported merchandise

Date: December 9, 1982
File: CLA-2 CO:R:CV:V
542900 CW
TAA #56

To: District Director of Customs, Charleston, South Carolina 29402.
From: Director, Classification and Value Division.
Subject: Internal Advice No. 109/82; Dutiability of Various Monetary Transfers Between Related Parties.

This is in reference to your memorandum of May 25, 1982, received in this office on August 12, 1982, which initiated the above-referenced internal advice request. The issues presented for consideration concern the dutiablity of certain monies, representing royalty-trademark fees and a portion of the proceeds from the resale of the imported merchandise, paid by the affected importer, (company) to its parent company in England, (foreign seller). All parties concerned agree that transaction value under section 402(b) of the Tariff Act 1930, as amended by the Trade Agreements Act of 1979 (TAA), is the proper basis of appraisement.

These issues orginally arose as a result of an audit of the importer's operations conducted by the Regulatory Audit Division, Miami

419-643 O - 83 - 3

Region. The Audit report, dated April 26, 1982, concluded that both the royalty-trademark fees and the resale proceeds paid to the foreign seller are dutiable pursuant to section 402(b)(1)(E) of the TAA, the provision which provides for the inclusion in transaction value of:

> (E) The proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller.

The record reveals that the importer produces finished microjectors from microjector components and steel bars which it purchases from its parent company in England. The finished articles are then resold to (third party) for use as part of diesel fuel injection equipment on (automobile name) vehicles. The importer and the foreign seller have entered into an agreement in which the former agrees to pay the latter, on a quarterly basis, a 5-percent royalty-trademark fee which essentially is based on the difference between the importer's purchase price for the imported components and the resale price of the completed microjectors in the United States.

In the opinion of your office, the royalty-trademark fee is not dutiable under the TAA provision for royalty or license fees, section 402(b)(1)(D), because payment of the fees is not a condition of the sale for export of the microjector components from England. However, your office agrees with the Regulatory Audit Division that the fee *is* dutiable as a proceed of a subsequent resale under section 402(b)(1)(E). Counsel for the importer maintains that the fee is not dutiable under the royalty or license fee provision since the payment is, in effect, based on the value added in the United States and, thus, is unrelated to the imported merchandise. Counsel also contends that the fee is not dutiable under the subsequent proceeds provision for the reason that it clearly was not the intention of Congress:

> * * * to divide royalty payments into dutiable and nondutiable categories only to negate that division by returning most royalty payments found to be not dutiable under (D) to a dutiable status under (E).

Section 402(b)(1)(D) provides for the inclusion in transaction value of:

> (D) Any royalty of license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States.

We are unable to determine conclusively from the written agreement between the importer and the foreign seller whether or not the royalty-trademark fees are required "as a condition of the sale of the imported merchandise." However, inasmuch as the value of the imported components specifically is excluded from the royalty

computation formula, it is our opinion that the fee is not "related to the imported merchandise," as those words are used in subparagraph (D). The royalty-trademark fee, therefore, is not dutiable under this provision.

Concerning the proposed inclusion of the fee in transaction value as a proceed of a subsequent resale, this office concurs with the opinion expressed by counsel for the importer on this point. The existence of two separate categories, one specifically relating to royalty and license fees and the other to the proceeds of a subsequent resale, use or disposal of the imported merchandise, clearly indicates to us that the two categories were not intended to cover the same set of circumstances. Thus, when a royalty or license fee is found not to be a part of transaction value under category (D), no authority exists for including the fee in transaction value as "the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accure, directly or indirectly, to the seller." We, therefore, conclude that payments made under the royalty-trademark agreement in this case are not includable in transaction value.

In regard to the second issue, the importer and foreign seller have agreed that the former will retain 8 percent of the resale price of the microjectors in the United States while the remaining proceeds of the resale will accrue to the seller. Both your office and counsel for the importer concur in the audit report conclusion that the amount of the proceeds accruing to the seller under this agreement is dutiable under section 402(b)(1)(D). We agree.

(C.S.D. 83-100)

This ruling holds that the refund of special tonnage tax and light money assessed on an American vessel should be denied for failure to provide a valid reason for not depositing, with appropriate Customs officers, the Original Certificate of Documentation issued by the U.S. Coast Guard for that vessel. (46 U.S.C. 8)

Date: May 4, 1983
File: VES-11-10-CO:R:CD:C
106058 HS

To: District Director of Customs, Los Angeles, California 90731.
From: Director, Carriers, Drawback and Bonds Division.
Subject: Refund of Special Tonnage Tax and Light Money Assessed on the American barge (vessel name).

This is in response to your letter of March 7, 1983, forwarding a request by (Corporation name) for review by Headquarters of your decision to deny the (vessel) a refund of special tonnage tax and light money.

The (vessel), an American barge, arrived in Los Angeles/Long Beach on February 23, 1982. At time of formal entry, the vessel's registry was not on board and was thought to be lost. A photocopy of the registry was presented. Customs contacted the Coast Guard in San Francisco, the home port, and verified that the vessel was a United States-registered vessel. However, because the official document was not on board the vessel, when Customs suggestion that a new or temporary document be obtained from the Long Beach Coast Guard was rejected by the broker because the broker preferred to wait until the vessel reached its home port, Customs charged special tonnage tax of $442.50 and light money of $442.50 on the vessel. The broker applied for a refund of the special tonnage tax and light money on April 7, 1982, stating that it had proved to Customs through the photocopy and their conversation with the Coast Guard that the (vessel) was a U.S.-flag vessel and, therefore, was not subject to special tonnage tax and light money. You denied the application for a refund in April of 1982 because the barge was undocumented at the time of entry in Los Angeles/ Long Beach. Western Overseas, by letter of February 16, 1983, now requests that we review your denial of the refund.

Title 46, United States Code, section 8, provides that whenever any charges arising under the laws relating to vessels or seamen has been paid to any Customs officer, and application has been made within one year from such payment for the refund or remission of the payment, the Commissioner of Customs has the power to refund so much of the charges as he thinks proper if upon investigation he finds that such charge was illegally, improperly or excessively imposed.

Any application for a refund of special tonnage tax filed pursuant to section 8 must also be made in accordance with section 4.24, Customs Regulations. Pursuant to section 4.24(c), Customs Regulations, application shall be made within one year from date of payment. Application in this case was made on April 7, 1982, well within the one year statute of limitations.

Before or at the time of formal entry of an American vessel, the original Certificate of Documentation issued by the U.S. Coast Guard must be deposited with the appropriate Customs officer (section 1434, Tariff Act of December, 1930, as amended; section 4.9(b), Customs Regulations). The net tonnage of the American vessel, found under section 4.20(a), Customs Regulations, is based on the original Certificate of Documentation. Since the original Certificate of Documentation was not so presented in this case, Customs officers treated the vessel as an undocumented vessel owned by citizens and, pursuant to the table in section 4.20(c), Customs Regulations, properly collected special tonnage tax and light money.

The U.S. Coast Guard has informed us that Document No. 611224 was issued to the (vessel), owned by (company name) on November 5, 1979. Due to the Vessel Documentation Act (see T.D. 82-

138), the original document was turned into the Coast Guard on September 3, 1982 and a new Certificate of Documentation was issued on September 8, 1982.

The reason given in the application for refund for not producing the original document is that the document "was not on board and was thought lost, possibly taken by the Mexican authorities before her arrival here in L.A." The petition refers to "a lost document." Since the Coast Guard informs us that the document was turned in on September 3, 1982, it is apparent that it was not lost. Therefore, since the petitioner's explanation of the reason for not depositing the document does not appear to be valid, the petition is denied.

(C.S.D. 83-101)

This ruling holds that vitamin E of the United States origin which is shipped in bulk to Mexico for encapsulation and then returned in that condition to the United States would be classifiable under item 412.60 of the Tariff Schedules of the United States (TSUS)

Date: June 16, 1983
File: CLA-2 CO:R:CV:VS
071334 FF

This is in reply to your letter dated April 29, 1983, concerning the tariff status of vitamin E (d1 alpha Tocopheryl Acetate) of United States origin which will be shipped in bulk to Mexico for encapsulation and then returned in that condition to the United States.

You indicate that you were informally advised that the capsules upon return to the United States would be subject to full duty despite the fact that the bulk vitamin E was produced in the United States. You are of the opinion that this result would penalize the United States supplier of bulk vitamin E for the reason that someone could either (1) import vitamin E of European or Japanese origin, export the bulk vitamin E for encapsulation with benefit of drawback and pay duty on the capsules upon their importation into the United States or (2) purchase and ship the bulk vitamin E directly to Mexico on a CIF basis. You state that you would prefer to deal directly with the United States producer without suffering additional costs and you therefore request that we reevaluate this situation so as to conclude that duty would be based only on the foreign costs attributable to the imported product.

It should first be pointed out that all merchandise imported into the United States is subject to duty on its total value and quantity unless specifically exempted. Under item 800.00, Tariff Schedules of the United States (TSUS), products of the United States are entitled to duty-free entry when returned after having been exported, provided that they have not been advanced in value or improved in

condition by any process of manufacture or other means while abroad. There are no other provisions in the tariff schedules allowing a reduced or free rate of duty which could possibly apply to the merchandise described in your letter.

As concerns the two described situations which you believe would operate to the detriment of United States suppliers of vitamin E, it should be noted, first, that Headnote 1, Part 1, Schedule 8, TSUS, provides that, in the absence of a specific provision to the contrary, the tariff status of an article is not affected by the fact that it was previously imported into the United States and cleared through Customs with or without the payment of duty, and, second, that under Headnote 1(a) of Subpart A of that Part, item 800.00, TSUS, does not apply to any article exported with benefit of drawback; therefore, vitamin E of European or Japanese origin imported into the United States with payment of duty and then exported with benefit of drawback and then reimported would not be subject to duty-free treatment under item 800.00, TSUS, and thus would be dutiable on its full value. Similarly, if vitamin E of foreign origin were sent directly to Mexico for encapsulation, duty would be assessed on the full value of the product upon its importation into the United States. We therefore do not believe that United States suppliers of vitamin E would be penalized as you suggest in your letter.

With respect to the encapsulation of United States vitamin E in Mexico, we are of the opinion that item 800.00, TSUS, would not apply to the product upon its importation into the United States. In this regard it is noted that the effect of this procedure is to render the bulk product suitable for direct administration by the ultimate consumer in an individual dose; the capsules therefore become part of the imported product to be swallowed and thus must be distinguished from those containers or packings which are merely intended to facilitate transportation or retail sale and which have a function separate and distinct from the products which they contain. Moreover, there seems to be no doubt that the encapsulation results in products which have a higher total value than the bulk vitamin E prior to encapsulation. Accordingly, we are of the opinion that the product exported from the United States would be advanced in value and improved in condition within the meaning of item 800.00, TSUS.

Accordingly, the merchandise in question is classifiable in item 412.60, TSUS, and is dutiable on its full value at the rate of 12.9 percent ad valorem.

(C.S.D. 83-102)

This ruling holds that parts of firearms entered for a warehouse at the same or different times and later manipulated in the warehouse by repacking and sorting and finally withdrawn for consumption are classified as firearms provided that sufficient parts will constitute the desired number of firearms. (19 U.S.C. 1562, CD 1726, TD 54067 and General Headnote 10(h), TSUS).

Date: June 17, 1983
File: WAR-1-CO:R:CD:D
215878 L

Issue: Are parts of firearms imported and entered into a Customs bonded warehouse at the same or different times, there repacked and sorted, and subsequently withdrawn from warehouse for consumption in various forms but with parts sufficient to constitute a specific number of firearms, treated as parts of firearms or as entireties?

Facts: Parts of firearms will be imported in the following circumstances and placed in bonded warehouse:

1. Parts sufficient to produce a given number of firearms will be imported in a single shipment and entered into the warehouse. Those parts will be so packed that each carton will contain the parts necessary to produce one firearm or a specific number of firearms.

2. Parts sufficient to produce a given number of firearms will be imported in a single shipment and entered into the warehouse. However, unlike the circumstances above, each carton of the shipment will contain a single type of part. That is, one carton would contain 50 barrels, another would contain 50 stocks, another would contain 50 triggers, etc.

3. Parts of firearms will be imported in various shipments and placed in bonded warehouse without regard to whether or not any particular shipment contained the requisite number and variety of parts to produce a specific number of firearms.

We are asked to assume, for the purposes of this ruling, that the parts withdrawn from the warehouse for consumption will be so configured that they will qualify for tariff classification as complete, but unassembled, firearms pursuant to General Headnote 10(h), Tariff Schedules of the United States.

In the case of situation No. 1, those numbers of cartons required by the exigencies of business will be withdrawn for consumption. After withdrawal, the firearms will be assembled.

In the case of situations No. 2 and No. 3, parts necessary to constitute a specific number of firearms will be sorted out and repacked. Those repackaged parts will thereafter be withdrawn for consumption and assembled into firearms.

Law and Analysis: As a general rule, articles are imported when they arrive within the Customs territory of the United States with

intent to unlade. *James G. Wiley, a/c Pasadena Firearms Co.* v. *U.S.*, C.D. 2645 (1966), and cases cited therein.

United States v. *Schoverling*, 146 U.S. 76, 13 Sup. Ct. 24 (1892), follows the general rule. Gunstocks and barrels were separately imported for the account of the same importer. The Collector of Customs attempted to assess duty upon these separate importations based on the importer's intent to assemble them after importation. The court held that duty must be assessed based on the condition of the articles as imported.

United States v. *Irwin*, 78 Fed. 799 (2d Cir. 1897), used the same rationale but reached a different result because parts of shotguns were imported on the same vessel, merely in different boxes; they were seen to be entireties upon the moment of their importation. The court went on to say, however, that if the parts had been shipped on separate vessels they could be considered as separately dutiable even though they arrived on the same day.

In *Wiley, supra*, the court said that importation on separate aircraft arriving on the same day and made the subject of separate entries were not subject to the entireties doctrine. *United States v. Baldt Anchor, Chain & Forge Division of Boston Metals*, 459 F. 2d. 1404, C.A.D. 1051 (1972), said that articles not imported together were precluded from being classified as entireties.

Warehoused goods represent an exception to the general rule. There is a line of cases which hold that goods in bonded warehouses are not to be considered "imported" until a permit of delivery has been issued and they then enter into the commerce of the United States. *Stone and Downer Co. v. U.S.*, 19 CCPA 259, T.D. 45388 (1931); *Casazza & Bro. v. U.S.*, 13 Ct. Cust. Appls. 627, T.D. 41481 (1926); *Hartranft v. Oliver*, 125 U.S. 525 (1887); *Five Per Cent Cases*, 6 Ct. Cust. Appls. 291, T.D. 35508, (1915); *Atlas Marine Supply Co. v. U.S.*, C.D. 549 (1941); *Parfums Corday, Inc. v. U.S.*, C.D. 597 (1942). See also *dicta* at page 351 of *Franklin Industries Inc. v. U.S.*, 1 CIT 349 (1981).

The exception is reinforced by the cases concerning 19 U.S.C. 1562, the manipulation statute. Section 1562 provides in part that:

> [M]erchandise may be cleaned, sorted, repacked, or otherwise changed in condition, but not manufactured, in bonded warehouses established for that purpose and be withdrawn therefrom * * * for consumption, upon payment of duties accruing thereon, in its condition and quantity and at its weight, at the time of withdrawal from the warehouse, with such * * * deductions from the final appraised value as may be necessary by reason of change in condition.* * *

In *Marques Del Merito, Inc. v. U.S.*, 36 CCPA 38, C.A.D. 394 (1948), the court decided that in 19 U.S.C. 1562 Congress evidenced an intention to make an exception to the rule that "importation" means bringing goods within the jurisdictional limits of the United States with an intention to unlade. The court states that goods

became subject to duty ("imported") in their condition at the time of withdrawal from the warehouse.

The lower court discussed this subject and reached the same conclusion in *Marques Del Merito, Inc. v. U.S.*, C.D. 1080 (1948); the court found that section 1562 required reclassification of merchandise if, in fact, the manipulation changed the dutiable character of the merchandise. The court said:

> By the provisions of the Tariff Act of 1930, as amended, Congress intended to change the ordinary rules regarding classification of merchandise so as to make the condition upon withdrawal from the warehouse of merchandise manipulated under that section the determinant of its classification.

In *Garvey v. U.S.*, C.D. 1726 (1955), the following portion of the Customs Regulations, section 19.11(d), was held to be invalid:

> * * * but if the manipulation produces two or more parts of an article constituting an entirety, the parts shall not be classified separately if all the parts constituting the entirety are withdrawn for consumption under a single withdrawal.

The court reasoned that this was an amendment to 19 U.S.C. 1562 not intended by Congress. Customs published T.D. 54067, which deleted that portion of section 19.11(d), specifically noting that the deletion was to conform to the court decision.

The Customs Court was even more explicit in *Manca, Inc. v. U.S.*, Abs. 62666 (1959). Merchandise had been entered into a warehouse as completed microscopes by the importer; they were manipulated, dismantled and repacked and withdrawn as parts of microscopes (under two different classifications) on one warehouse withdrawal for consumption. In discussing C.D. 1726, the court said that one sentence of section 19.11(d) had been held invalid because "* * * in seeking to fix a classification as entireties on manipulated merchandise when it is withdrawn for consumption under a single withdrawal the said provision had the effect of imposing a limitation on the statute which was not applied by Congress. Under the stipulated facts the cited decision has equal force and effect in this case."

It must be noted, of course, that both *Garvey* and *Manca* were decided prior to promulgation of General Headnote 10(h), Tariff Schedules of the United States.

With respect to situations 1, 2, and 3, as set out in *Facts, supra*, and assuming that sufficient parts to constitute the desired number of firearms are withdrawn from warehouse for consumption on a single withdrawal, they will be classifiable as firearms and not as parts of firearms. The operations described in situations 1, 2, and 3 are permissible in a manipulation warehouse.

Holding: Parts of firearms imported and entered for warehouse at the same or different times, manipulated by repacking and sorting, and subsequently withdrawn for consumption are classifiable

as firearms assuming that the parts withdrawn constitute a complete but unassembled firearm or firearms.

(C.S.D. 83-103)

This ruling holds that the sole of an infants' vinyl jogger overlaps the upper by less than 1/16 inch, therefore the sole does not overlap the upper than at the toe or heel. Since the sole does not extend over and cover part of the upper, the footwear is classifiable under the provisions for other footwear in item 700.61, TSUS.

Date: June 22, 1983
File: CLA-2 CO:R:CV:G
069886 C

In a letter dated March 9, 1982, you inquired as to the dutiable status of certain infants' footwear manufactured in Hong Kong. A sample was submitted for examination.

The sample is an infants' vinyl jogger. Under 30-power magnification, the blue trim clearly possesses a textile, flocked surface. The unit molded sole of the sample overlaps the upper at the toe and heel.

With the advent of the new provisions replacing item 700.60, Tariff Schedules of the United States (TSUS), the proper interpretation of the phrase "except footwear with soles which overlap the upper other than at the toe or heel" which appears in the inferior heading immediately proceeding items 700.61 through 700.71, TSUS, has become a problem. In this instance, the specific issue involved is whether the sole of the jogger overlaps the upper other than at the toe or heel.

The Summary of Trade and Tariff Information, Rubber Footwear, USITC Publication 841, March 1981, at page 6, states in pertinent part that "items 700.61-700.63 provide for footwear that is held to the foot with the use of laces, buckles, or other fasteners and that is of cement construction, and is primarily intended to cover joggers. Items 700.64, 700.67, 700.69, and 700.71 provide for similar footwear of other than cement construction, and primarily covers sneakers of tennis shoes."

Although the phrase "except footwear with soles which overlap the upper other than at the toe or heel" was obviously intended to prevent rubber-soled footwear other than standard cement joggers from being classified under items 700.61 through 700.63, TSUS, Customs has classified a women's casual shoe having a imitation welt under item 700.61, TSUS. The rationale for this position, which is currently being reconsidered, is that the imitation welt does not overlap the shoe upper because it is not a part of the sole.

It is our position that the phrase "soles which overlap the upper other than the toe or heel" should be interpreted in the light of following criteria:

(1) The sole must extend over and cover part of the upper.

(2) In measuring overlap when the overlap is uniform, only one cut is to be made in the shoe, and that cut is to be made at the edge where the ball of the foot would normally rest. If the overlap is not uniform, the cut should be made at the point where the greatest amount of overlap occurs.

(3) A sole will be considered to overlap the upper if a vertical overlap of 1/16 inch or more exists from where the upper and the outsole initially meet measured on a vertical plane. If this vertical overlap is less than 1/16 inch, the sole is presumed not to overlap the upper.

The sole of the sample jogger overlaps the upper by less than 1/16 inch. Following the criteria set forth above, it is our position that the sole does not overlap the upper other than at the toe or heel. Consequently, the subject footwear is classifiable under the provision for other footwear which is over 50 percent by weight of fibers and rubber or plastics with at least 10 percent by weight being rubber and plastics and having uppers of which not over 90 percent of the exterior surface area is rubber or plastics: Other: Footwear having soles (or midsoles, if any) of rubber or plastics which are affixed to the upper exclusively with an adhesive (any midsoles also being affixed exclusively to one another and to the outsole with an adhesive); valued not over $6.50 per pair in item 700.61, TSUS, and dutiable at the rate of 37.5 percent ad valorem.

(C.S.D. 83-104)

This ruling holds that a waiver of the requirement to export damaged merchandise to obtain drawback under 19 U.S.C. 1313(c) cannot be granted, absent a showing that exportation is impossible or futile. Drawback may not be had under that section for merchandise not exported within five years of the date of importation

Date: June 24, 1983
File: DRA-1-09-CO:R:CD:D
215947 # B

Issue: Whether an offset may be made against drawback paid under 19 U.S.C. 1313(c) for the salvage value of damaged merchandise which allegedly cannot be exported.

Facts: A Customs field office has asked for internal advice based on the following circumstances:

An American corporation, "S," contracted with the United States Department of the Interior (Interior), to have "S's" parent corporation in Japan manufacture new oil filled electrical transmission

cable systems which would be tested and installed in three generating units of the third power plant of the Grand Coulee Dam. The cable was to be capable of transmitting 525,000 volts over a cable length of 20 kilometers. The cable, custom designed and manufactured in 60-ton, 1200-meter lengths, was imported between March and October 1976, and duty of $303,963 was paid.

"S" states that it, its parent corporation, and Interior were aware that the conformance of this cable to contract specifications could be observed only over an initial 5-year period during which any cable fault or failure, not due to Interior's negligence, would be viewed as product nonconformance because of failure to meet specifications of the original contract.

The cable was installed in 1977, but due to operational problems was not energized and made functional until April 1979. Thereafter, the three cable circuits were severely damaged by fire on July 20, 1981. At the time of the fire, the cable circuits had been in operation for 3,850 hours, or less than one-half year of continuous operation. According to "S," the normal useful life of this type cable is approximately 50 years.

An Interior investigation indicates the cable failed in that the copper wires in the fabric tape did not, according to Government investigators, make contact with its aluminum sheathing.

Consequently, "S" has agreed to remove all the old, damaged cable and to replace it with new cable conforming to Government specifications. The recovered cable is essentially worthless as cable, having a metal scrap value of approximately $100,000. The subcontractor removing the cable (scrap) has agreed to reduce the removal fee by the salvage value of the material.

The corporation believes that in view of the length, weight, and condition of the fire-destroyed cable, literal compliance with the exportation requirement of 19 U.S.C. 1313(c) is not possible. While asking for an extension of the 90-day period for completing and filing a claim for drawback, "S" asks that approval be given for disposition of the salvage through the subcontractor, as described above, and that duty on the fair salvage value of the damaged cable be deducted from the amount refunded as drawback.

Law and analysis: There can be no recovery in this case, inasmuch as more than five years have elapsed since importation of the cable. Section 1313(i) of Title 19, United States Code, provides:

> No drawback shall be allowed under the provisions of this section unless the completed article is exported within five years after importation of the imported merchandise.

This provision was enacted as section 313(h) of the Tariff Act of 1930, as amended, because many enterprising businessmen were purchasing goods long having been imported into this country, performing some manufacturing processes on those goods, then exporting them, obtaining as drawback more money than they paid to purchase them.

In addition to the need for a time limitation for obtaining drawback, the Treasury Department and Customs felt that regarding merchandise not conforming to sample or specification, American importers were at the mercy of foreign shippers. Unless the importer manufactured the rejected goods, drawback could not be had. To remedy these "principal evils" 19 U.S.C. 1313(c) was enacted and it was decreed that drawback in any case should not be allowed with respect to merchandise not exported within three years of importation. This period was later increased to five years by the Customs simplification Act of 1953, Public Law 83-243.

For complete details of the basis for 19 U.S.C. 1313(c) and the requirement that drawback articles be exported within five years of their importation, see the legislative history of Public Law 71-369, the Tariff Act of 1930, 71st Cong., (H.R. 2667), Vol. 9, Part 2, p. 9749, whereat are found the comments by the then Commissioner of Customs, the Honorable E. W. Camp. The Congress not only adopted the Commissioner's legislative suggestions without comment, the 5-year period suggested by the Commissioner was reduced to three years.

A discussion of whether an extension of time to return the cable to our custody is unnecessary due to the foregoing. Nevertheless, we believe the question asked under *ISSUE, supra,* should be answered.

The statute, 19 U.S.C. 1313(c), provides that a refund of 99 percent of duties shall be refunded as drawback upon the exportation of merchandise not conforming to sample or specification or which is shipped without the consent of the consignee, provided the merchandise is returned to Customs for examination within 90 days of the date of its release from our custody, unless the Secretary's delegate (a Customs field office or Customs Service Headquarters) authorizes a longer period.

Failure to meet warranty guarantees as to length of service does not of itself constitute a failure to conform to specifications for purposes of the law. When the credit allowed in such cases is for all or substantially all of the purchase price, the mechandise may be considered as not conforming. However, when the credit allowed diminishes in porportion to the time which the imported merchandise has been used, the fact that an article does not serve the full warranted period does not of itself constitute a case of nonconformance (See T.D. 66-169-1 of July 19, 1966). Earlier, we had held that the standard for nonconformance was a refund of at least 90 percent of the purchase price (See T.D. 69-120-3 of March 4, 1969). Because the supplier/seller "S" has agreed to replace all the cable, we believe the standard of T.D. 66-169-1 has been met. The burden of showing failure to meet specification as set out in section 22.32(b) of the regulations has always been on the importer/claimant. See *Border Brokerage Company v. United States,* 53 Cust. Ct. 6, C.D. 2465 (1964).

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In granting drawback claims pursuant to 19 U.S.C. 1313(c), there is no statutory authority which allows us to make a partial payment corresponding to the amount allowed by the manufacturer under a warranty. The payment by Customs is all the duty, less one percent, on the defective merchandise, or no payment at all. This presents the next problem regarding the alternatives of disposition of the salvaged merchandise. It has long been fundamental to drawback law that claimants must adhere to the requirements set forth in the statutes and applicable regulations. See *U.S.* v. *C. Hardesty Co.*, 36 CCPA 47, C.A.D. 396 (1949); *Spencer Kellogg & Sons* v. *U.S.*, 13 Ct. Cust. Appls. 612, T.D. 41459 (1926). The statute we are concerned with specifically authorizes payment of drawback only upon the exportation of the defective merchandise. To be sure, in some cases it would be literally impossible to meet the exportation requirement, or meeting it would be a useless step, as we decided in the case of the crashed airliner, the remains of which were worthless. To export worthless scrap would be a vain and wasteful step. This is not one of those cases, however. Were we faced with an "impossible" or "wasteful" situation, we would not demand exportation; but in this case these situations do not exist. The defective cable, albeit severely damaged, has been or will be recovered to the extent that it can be recovered. Moreover, the fact that the subcontractor wishes to retain the cable as part payment for removal indicates the cable can be transported. The cable has value. As an administrative agency we have no authority to waive a statutory requirement, and the statute under scrutiny offers no alternative to the requirement of exportation, when exportation is possible and a non-futile act. See particularly *Swan Tricot Mills Corporation* v. *U.S.*, 63 Cust. Ct., 530, C.D. 3948 (1969). Of course, because of section 1313(i), the matter of necessity of exportation in this case is moot.

Holding: Drawback under 19 U.S.C. 1313(c) may not be had for merchandise not exported within five years of importation as required by 19 U.S.C. 1313(i).

Because all defective merchandise must be exported in order to receive drawback under 19 U.S.C. 1313(c), there can be no allowance or deduction from the drawback payment for the salvage value of defective merchandise which is not exported. In cases where the defect causes total destruction of the merchandise, rendering it valueless, and exportation thereof either an impossible or futile step, the scrap is to be disposed of as directed by Customs (See Headquarters Letter 200059 of September 30, 1975—DRA-7-01-R:CD: JL).

Alternative: Were it not for 19 U.S.C. 1313(i) the salvaged cable could be placed in a foreign trade zone under zone restricted status. This placement constitutes an exportation for purposes of drawback. Once placed in a zone under that status, the cable must be

exported, destroyed, or stored, and cannot be returned to the customs territory of the United States.

(C.S.D. 83-105)

This ruling holds that lottery advertisements and applications for lottery tickets printed in brochures imported into the United States for insertion or binding in foreign editions of a magazine printed in the United States for exportation and distribution abroad are prohibited under 19 U.S.C. 1305. (18 U.S.C. 1301 and 19 U.S.C. 1307(b)(2))

Date: June 27, 1983
File: RES-2-10 CO:R:E:E
722014 JB

This ruling concerns the importation of brochures containing advertising and ticket application forms for a foreign lottery for binding in the foreign edition of a magazine to be exported and distributed abroad.

Issue: Are lottery advertisements and applications for lottery tickets prohibited importation into the United States if the materials are to be bound to a publication and exported therewith for distribution outside the United States?

Facts: The brochure is a magazine supplement containing advertisement and ticket application forms for a lottery to be conducted in a foreign country. The brochure, after importation and as proposed, will be bound in the foreign edition of a national magazine at the premises of an affiliate and delivered to a distributor for packing, crating, and delivered to various airlines for distribution throughout Latin America.

Law and analysis: Title 19 U.S.C. 1305 (section 305 of the Tariff Act of 1930, as amended), provides in pertinent part that, "All persons are prohibited from importing into the United States from any foreign country * * * any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery."

Title 18 U.S.C. 1301 also prohibits the importation of lottery tickets or any paper or instrument dependent on the event of a lottery or any advertisement thereof. This statute was amended in 1979 (Public Law 96-90) in part by the enactment of 19 U.S.C. 1307(b)(2) to eliminate the prohibitions in 18 U.S.C. 1301 for the transportation or mailing to an addressee within a foreign country of equipment, tickets, or material designed to be used within that country in a lottery which is authorized by the law of that country. However, the statute (19 U.S.C. 1305) which prohibits the importation into the United States of lottery tickets, or advertisements concerning any lottery, was not amended to permit importation and, consequently, remains in full force and effect. Modification of the law

concerning the importation of lottery tickets and publications containing advertisements of any lottery is, therefore, a matter for consideration by the Congress.

Holding: The importation and release from Customs custody of brochures containing lottery advertisements and applications for lottery tickets for insertion or binding in foreign editions of a magazine printed in the United States for exportation and distribution abroad is prohibited under 19 U.S.C. 1305.

(C.S.D. 83-106)

This ruling holds that the dredging of gravel on the outer continental shelf off the north coast of Alaska to create an artificial island for the purpose of oil drilling; and the transportation of that gravel between the dredging location and the point at which the artificial island is to be constructed must be by coastwise qualified vessels. (46 U.S.C. 883, 46 U.S.C. 292)

Date: June 28, 1983
File: VES-3-15/VES-10-02
CO:R:CD:C 106152 PH

This ruling concerns the dredging of gravel on the outer continental shelf off the north coast of Alaska to create an artificial island for the purpose of oil drilling and the transportation of that gravel between the dredging location and the point at which the artificial island is to be constructed.

Issues: 1. May a foreign-built barge be used to transport gravel between a location on the outer continental shelf where the gravel is dredged and another location on the outer continental shelf where the gravel is to be used to construct an artificial island for the purpose of oil drilling?

2. May a foreign-built barge supply power to a United States-built dredge while the latter vessel engages in dredging in United States waters?

3. May a United States-built, coastwise-qualified dredge be assembled in Canada from modules into which it was cut in the United States and be outfitted in Canada with United States-built equipment and retain its entitlement to engage in the coastwise trade and in dredging in the United States?

Facts: The inquirer represent a client who is considering bidding upon a contract involving the creation of an artificial island for purposes of oil drilling north of the Alaskan coast in the Beaufort Sea. The fill for the island will be dredged from a location outside United States territorial waters, approximately 10 miles from shore, and transported to another location outside United States territorial waters, approximately 30 miles from shore. The inquirer asks whether the gravel fill may be transported between these locations by a foreign-built non-self-propelled barge, whether the

answer to this question would be affected if either of the locations were within 3 miles of a fixed structure, when, if at all, the artificial island becomes United States territory, and what effect on the island the carriage to it of dredged gravel by a foreign-built barge would have.

The inquirer's client is also considering buying a United States-built non-self-propelled suction dredge which holds a coastwise document. A foreign-built, foreign-flag barge which can provide the electrical power necessary to operate the dredge is mechanically attached to it but capable of being detached in a few hours. When operating as a unit, the two vessels operate around spuds located on the after end of the power-providing barge. The inquirer asks if the foreign-built barge may supply power to the dredge while it engages in dredging in United States waters.

The inquirer also requests a ruling as to whether a United States-built dredge documented for the coastwise trade but not outfitted in the United States could be cut into modules and shipped by land to a Canadian point where it would be reassembled and outfitted with United States-built equipment and still retain its coastwise trading privileges. The dredge would remain under United States ownership and control.

Law and Analysis:

Issue 1: Title 46, United States Code, section 883, in pertinent part, prohibits the transportation of merchandise between points in the United States embraced within the coastwise laws in any vessel other than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States. A point in United States territorial waters is considered a point embraced within the coastwise laws of the United States, for purposes of this provision. Customs has ruled that "merchandise," for purposes of section 883, includes anything of commercial value, including dredged or otherwise obtained material that is to be used to create an island or jetty.

Section 4(a) of the Outer Continental Shelf Lands Act of 1953, as amended (43 U.S.C. 1333(a)) (OCSLA), provides, in pertinent part, that the laws of the United States are extended to "* * * the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purposes of exploring for, developing, or producing resources therefrom * * * to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State."

Under the foregoing provision, we have ruled that the coastwise laws are extended to mobile rigs during the period they are secured to or submerged onto the seabed of the outer continental shelf (Treasury Decision 54281(1), copy enclosed). Subsequent rulings ap-

plied the same principles to drilling platforms, artificial islands, and similar structures.

Section 203 of the OCSLA Amendments of 1978 (92 Stat. 629, 635) (1978 Amendments), amended section 4(a) of the OCSLA by substituting "* * * and all installations and other devices permanently or temporarily attached to the seabed * * *" for "* * * and fixed structures * * *." The purpose of this change was stated in the legislative history to be to make it clear "* * * that Federal law is to be applicable to all activities on all devices in contact with the seabed for exploration, development, and production." Thus, Federal law was intended "* * * to be applicable to activities on drilling ships, semisubmersible drilling rigs, and other watercraft, when they are connected to the seabed by drillstring, pipes, or other appurtenances, on the OCS for exploration, development, or production purposes." (House Report 95–590 on the 1978 Amendments, page 128, reproduced at 1978 U.S.C.C.A.N. 1450, 1534.)

On the basis of the 1978 Amendments, we have ruled that the coastwise laws extend to devices such as a buoy marker submerged onto or attached to the outer continental shelf for the purpose of resource exploration operations and to a well casing with attendant accessory systems when submerged into the seabed of the outer continental shelf. We modified this last ruling by holding that a point at which no buoy marker is submerged onto or attached to the shelf and no well has been sunk into the seabed is not a coastwise point even if there are buoys or wells in the general vicinity. We also have ruled that a location on the outer continental shelf where an artificial island is being constructed becomes a point in the United States, for purposes of the coastwise laws, when any part of the incipient artificial island is above the level of mean high water, defined as the average height of all high waters over a given location during a span of 18.6 years.

Accordingly, gravel fill could be transported by a non-coastwise-qualified barge between two points on the outer continental shelf so long as one of those points was not considered a coastwise point. If, at the point from which the gravel was transported, a dredge were attached to the seabed (i.e., operating around spuds as described in the facts) or a marker buoy were submerged onto or attached to the seabed for purposes of resource exploration operations, that point would be considered a coastwise point. We consider the dredging of gravel to build an artificial island for exploratory oil well drilling or the use of a marker buoy to mark the location at which the dredging is to take place or the artificial island is to be constructed or an oil well is to be drilled to be an activity for the purpose of resource exploration operations. If a marker buoy or any other device or installation were submerged onto or attached to the seabed for purposes of resource exploration operations at the point where the island is being constructed, that point would be considered a coastwise point. Furthermore, the location at which

the artificial island was being constructed would be considered a coastwise point when any part of the incipient artificial island was above the level of mean high water. At that time, the incipient artificial island would become subject to the Customs and navigation laws, including the coastwise laws, the laws on entrances and clearances of vessels, and the provisions for dutiability of merchandise (Treasury Decision 54281(1)). Thus, if one or neither of the points between which the gravel is transported is a coastwise point, a non-coastwise-qualified barge may transport the gravel between the points. If both of the points are coastwise points the transportation between them by a non-coastwise-qualified vessel is prohibited.

The existence of a fixed structure on the outer continental shelf within 3 miles of one of the points between which the gravel is transported would not affect the above answer. We have ruled that a point at which no buoy marker is submerged onto or attached to the outer continental shelf and no well has been sunk into the seabed is not a coastwise point even if there are buoys or wells in the general vicinity. (See also, 43 U.S.C. 1332(2) in which it is declared to be the policy of the United States that the OCSLA "* * * shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing thereon shall not be affected." If United States territorial waters were extended 3 miles from fixed structures on the outer continental shelf as a result of the OCSLA, the character of the waters above the outer continental shelf as high seas would be affected by the OCSLA.)

We are aware of no effect that the carriage of dredged gravel to the artificial island by a foreign-built barge would have on the island, assuming that no laws are violated.

With regard to the transportation of gravel by a non-self-propelled barge, the inquirer should be aware that 46 U.S.C. 316(a) prohibits the towing by a non-coastwise-qualified vessel of any vessel other than a foreign-flag vessel or a vessel in distress between coastwise points. The discussion above as to what constitutes a coastwise point on the outer continental shelf is also applicable for purposes of this statute.

Issue 2: Title 46, United States Code, section 292, provides that, with a now obsolete exception,

> [a] Foreign-built dredge shall not, under penalty of forfeiture, engage in dredging in the United States * * *.

We have long held that dredging in United States territorial waters is dredging in the United States for purposes of this statute.

We have ruled that the use of a foreign-built barge to transport fuel from a United States port to a dredging site in United States waters where the fuel is used to operate generators on board the barge which provide power to a United States-built dredge does not violate the coastwise laws (Customs Service Decision 80–121, copy

enclosed). However, in that ruling the question of the applicability of 46 U.S.C. 292 was not addressed. Furthermore, there was no evidence in that case to indicate that the power-supplying barge would be physically attached to the dredge as is true in this case. Accordingly, we do not consider Customs Service Decision 80–121 as precedent for the determination in this case of whether the use of the foreign-built barge to supply power to the United States-built dredge would violate 46 U.S.C. 292. We are, by this ruling, limiting Customs Service Decision 80–121 to its specific facts, insofar as 46 U.S.C. 292 is concerned.

The materials we have been able to obtain on the background and legislative history of 46 U.S.C. 292, as well as the statute on its face, clearly show that the purpose of section 292 was to limit dredging in the United States to United States-built dredges, that is, the statute was to protect United States-built dredges and the United States shipbuilding industry. In this case, the power-providing barge would be mechanically attached to the dredge. We conclude that in these circumstances the barge is an integral part of the dredging operation and, therefore, that the use of the barge with the dredge to engage in dredging in the United States would be prohibited. To hold otherwise could result in the diminution of the protection given by law to United States-built dredges so that only a part of a United States-built dredge would be afforded the protection of section 292.

Issue 3: The determination of whether a vessel was built in the United States for purposes of documentation, formerly within the jurisdiction of the Customs Service, was transferred in 1967 to the Coast Guard. The definition of a United States-built vessel for this purpose is provided in section 67.09–3 of the Coast Guard Regulations (46 CFR 67.09–3, as promulgated in 1982 pursuant to the Vessel Documentation Act of 1980 (46 U.S.C. 65, *et seq.*)). Section 67.09–3 provides that a vessel is considered built in the United States if:

> (a) All major components of its hull and superstructure are fabricated in the United States; and
> (b) The vessel is assembled entirely in the United States; and
> (c) At least fifty (50) percent of the cost of all machinery (including propulsion) and components which are not an integral part of the hull or superstructure relates to items procured in the United States.

Under section 67.09–5 of the Coast Guard Regulations, a vessel which does not meet these requirements is considered foreign-built.

When various of the functions under the navigation laws were transferred from Customs to the Coast Guard in 1967, responsibility for enforcing and administering 46 U.S.C. 883 was retained by Customs except for the first and second provisos thereof which it was agreed relate to functions transferred to the Coast Guard and to functions retained by Customs. Under the first proviso of section

883, a vessel which has acquired the right to engage in the coastwise trade and is later sold foreign in whole or in part or placed under foreign registry may not reacquire the right to engage in coastwise trade. Under the second proviso of section 883, no vessel of more than 500 gross tons which has acquired the right to engage in the coastwise trade and which has later been rebuilt shall have the right thereafter to engage in the coastwise trade unless the entire rebuilding, including the construction of any major components of the hull or superstructure of the vessel, is effected within the United States. It was agreed in 1967 that 46 U.S.C. 292 relates to functions transferred to the Coast Guard and to functions retained by Customs. Subsequently, it was agreed that Customs would assume responsibility for enforcing section 292.

We defer to the Coast Guard as to whether or not a vessel is considered built in the United States or foreign-built. We are forwarding a copy of the inquirer's letter and of this ruling to the Coast Guard, at the address given in the letter transmitting this ruling, for appropriate action. If the Coast Guard determines that the dredge would be considered a foreign-built dredge as a result of its reassembly and outfitting in Canada, its engagement in dredging in the United States or in the United States coastwise trade would be prohibited by 46 U.S.C. 292 and 883, respectively.

If it is decided to move the dredge to Alaska, either in the way described in the facts or by having the reassembly and outfitting of the dredge take place in Alaska if the Coast Guard determines that reassembly and outfitting in Canada would result in a foreign-built vessel, the inquirer should be aware that the coastwise laws (46 U.S.C. 883 and 316(a)) and the vessel repair statute (19 U.S.C. 1466) could have some effect on the movement. Section 883 (see our discussion in Issue 1) would prohibit the use of a non-coastwise-qualified vessel to perform any part of the transportation of the dredge, whether or not cut into modules, between a point in the lower continental United States and another in Alaska, even though part of that transportation was by land through Canada. It is possible that one of two exceptions to section 883 may be applicable to this transportation. They are: (1) the third proviso of section 883, under which merchandise may be transported between points in the continental United States, including Alaska, over through routes recognized by the Interstate Commerce Commission and for which routes rate tariffs have been filed with that Commission when the routes are in part over Canadian rail lines and their own or other connecting water facilities (this proviso is less effective since the deregulation effected pursuant to the Staggers Rail Act of 1980 (94 Stat. 1895, codified in title 49, United States Code) and a bill to revoke it is now before Congress); and (2) section 4.80b(a), Customs Regulations, which provides that merchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is at a foreign port or place, or at a port or place in a

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territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.

Under 46 U.S.C. 316(a) (discussed in Issue 1), it is unlawful for a non-coastwise-qualified vessel to tow any vessel other than a foreign-flag vessel or a vessel in distress between points embraced within the coastwise laws of the United States. Such towing is prohibited even if by way of a foreign port or place or if the non-coastwise-qualified vessel only performs part of the towing between United States coastwise points.

As the inquirer is informed in the letter transmitting this ruling, applicability of the vessel repair statute (19 U.S.C. 1466) to the inquirer's proposal is being separately addressed (in a memorandum to the Regional Commissioner of Customs, Pacific Region, file: VES-13-CO:R:CD:C 106171).

Holdings: 1. A foreign-built barge may be used to transport gravel between the point on the outer continental shelf where the gravel is dredged and another point on the outer continental shelf where the gravel is to be used to construct an artificial island for the purpose of oil drilling if *one* or *neither* of the points is a coastwise point. The point at which the gravel is dredged would be a coastwise point if a device or installation, such as a marker buoy attached to the seabed to mark the dredging location or the dredge operating around spuds resting on or attached to the seabed, were attached to or submerged onto the seabed for the purposes of exploration, development, or production of resources from the outer continental shelf. The point to which the gravel is transported would be a coastwise point if a device or installation, such as a marker buoy attached to the seabed to mark the location at which the artificial island was to be built, were attached to or submerged onto the seabed for the purposes of exploration, development, or production of resources from the outer continental shelf or any part of the incipient artificial island were above the level of mean high water. If *both* of the points on the outer continental shelf between which the gravel is transported are coastwise points, its transportation by a foreign-built barge would be prohibited by 46 U.S.C. 883.

2. A foreign-built barge which is mechanically attached to a United States-built dredge and which supplies power to the dredge while the latter vessel engages in dredging in the United States would be considered an integral part in the dredging operation and, therefore, would be in violation of 46 U.S.C. 292.

3. If the United States Coast Guard determines that the United States-built, coastwise-qualified dredge under consideration would be considered foreign-built as a result of its being cut into modules in the United States and reassembled and outfitted in Canada with United States-built equipment, it will be so considered for purposes

of 46 U.S.C. 292 and 883, and could not engage in dredging in the United States or in the United States coastwise trade.

Effect on other rulings: Ruling letter VES-10-02-R:CD:C 104256 PH, October 3, 1979, published as Customs Service Decision 80-121, limited to its specific facts, insofar as 46 U.S.C. 292 is concerned.

(C.S.D. 83-107)

This ruling holds that the buying commission paid by a subsidiary corporation to its parent corporation is a *bona fide* buying commission under TAA and the commission should be excluded from the dutiable value of the merchandise

Date: June 28, 1983
File: CLA-2 CO:R:CV:VS
542912 LPD

To: Area Director of Customs, New York, New York 10048.
From; Director, Classification and Value Division.
Subject: Request for Internal Advice No. 46/82.

This is in response to your memorandum of March 18, 1982, received at Headquarters on April 1, 1982, initiating a request for Internal Advice regarding the dutiability of commissions paid by (Corporation name) in connection with handbags imported from the Orient.

Issue: Whether a commission paid by a subsidiary corporation to its parent corporation is a *bona fide* buying commission under the Trade Agreements Act of 1979 (TAA).

Facts: (Corporation name) (Importer) is a New York corporation which sells handbags, shoulder bags, tote bags and similar items to retailers in the United States. The company was established as a subsidiary of (Parent Corporation) (Buyer). In this regard there is a merger of interest and control because the same individual serves as president of both companies and is a major stockholder in Buyer.

It is alleged that Buyer acts as a buying agent for importer and other companies purchasing many types of merchandise from various manufacturers in the Orient. Buyer buys for the account of Importer in Hong Kong and the People's Republic of China and for the account of others in Hong Kong primarily, although a small number of items also may be purchased from mainland China for the account for others. For its services, Buyer receives a commission of up to 15 percent on orders for Importers and a commission of up to 5-6 percent on orders for other clients. The difference in commissions is attributed by Importer to the higher cost of doing business in the People's Republic of China.

In a typical transaction, orders are solicited from United States retailers by Importer and transmitted to Buyer who secures the merchandise from wholesalers and packs and ships it to Importer

in the United States. According to documents submitted by Importer, the merchandise is invoiced from the manufacturer to Buyer in Hong Kong dollars. Buyer then re-invoices the merchandise to Importer in United States dollars, setting forth the ex-factory price, its buying commission, freight and shipping charges, and the total cost of the merchandise.

Counsel for importer contends that inasmuch as the dealings between the two parties satisfy the legal requirements of a principal-agent relationship, the commission paid by Importer to Buyer is a *bona fide* buying commission. On the other hand, the National Import Specialist is of the opinion that the relationship between the parties is that of a buyer and a reseller.

Law and analysis: Under the TAA, buying commissions are not includable as part of the price actually paid or payable for imported merchandise. However, the totality of the evidence relative to the transactions must demonstrate that the purported agent is a *bona fide* buying agent. In this regard, "* * * no single factor is determinative * * * the existence of such a relationship must be ascertained by examining all relevant factors and each case is governed by its own particular facts." (*J. C. Penney Purchasing Corporation et al.* v. *United States,* 80 Cust. Ct. 84, C.D. 4741 (1978)).

To resolve the issue in this case two questions must be answered affirmatively:

(1) As a matter of law, can a parent corporation act as an agent for its subsidiary corporation?

(2) Do the facts support a finding that a *bonda fide* buying agency relationship exists?

As to the first question, the comment to section 14M, *Restatement of the Law of Agency* (ALI, 1958) provides that, in the absence of fraud or other illegal conduct:

> * * * a subsidiary may become an agent for the corporation which controls it or the corporation may become the agent of the subsidiary.

This conclusion is further supported by a case cited by counsel, *New York Air Brake Company* v. *International Steam Pump Co.,* 64 Misc. 347, 120 NYS 683 (1909), *aff'd* 136 App. Div. 931, 120 NYS 1137, which held that a principal may act as the agent of its subsidiary corporation.

More recently, the Customs Court has held that common control *per se* of the importer and commissionaire does not preclude a finding of a *bona fide* principal-buying agent relationship. (*Park Avenue Imports* v. *United States,* 62 Cust. Ct. 1035, ARD 255 (1969)).

Inasmuch as the above authorities demonstrate that there is no legal impediment to a parent's acting as an agent for its subsidiary, we turn to the second question.

In *Penney, supra,* the court stated that the primary consideration in determining whether a relationship is one of agency is the right of the principal to control the agent's conduct with respect to the

matters entrusted to him. In holding that the principal in that case exercised the requisite control over its agent to establish the existence of a *bona fide* buying agency relationship, the court cited the following factors as noteworthy:

> 1. The principal was active in selecting the merchandise and factories, while the agent was given no discretion in the purchase of the merchandise;
> 2. The agent provided market information, assisted in direct import buying activities, researched the market and gathered samples of merchandise in which the principal expressed an interest;
> 3. The principal visited the factories following the agent's research;
> 4. The merchandise was purchased by the agent on behalf of the principal and the factories were aware that the principal and not the agent was the purchaser of the merchandise;
> 5. The agent placed orders with the factories only after having been instructed to do so by the principal and looked to the principal for further instructions in those cases where the order could not be filled properly;
> 6. The principal could, if it had wished, bought directly from the factories and was not obligated to buy through the agent;
> 7. The agent was compensated for its services solely by the commission paid by the principal, it received no remuneration from the factories with which it dealt nor did it share its commissions with any of these manufacturers;
> 8. The agent did not buy for its own account, but for the principal's account and only upon instructions from the principal; and,
> 9. The agent maintained no separate inventory.

In *Park Avenue, supra,* where there was common control of the commissionaire and the manufacturer, the court noted that control of the agent by the principal is the *sine qua non* of the agency relationship. Quoting with approval from the appellant's brief, the court at 1042 stated:

> It might even be said as a general proposition that the closer the relationship or the greater the extent of the "common control" between an exporter and an importer, for example an exporter-employee and an importer-employer, the less likelihood that the exporter is either the seller or an agency of the seller or that the exporter's remuneration inures to the benefit of the seller or constitutes a part of the purchase price.

In this case, Importer has submitted a copy of its buying agency agreement with Buyer which states that Importer designates the articles to be purchased; Buyer visits manufacturers, works on samples as designated by Importer from time to time, submits samples to Importer for evaluation and securing orders, tries to negotiate the best possible prices and reports regularly on the market situation; upon instructions from Importer, Buyer places orders with

manufacturers on behalf of Importer, inspects the merchandise and prepares the necessary documents and papers.

In addition, Importer has submitted affidavits from manufacturers stating that they make their sales to Importer through Buyer, not at the manufacturers' direction, but because Importer wishes to deal through Buyer. Importer also has demonstrated that Buyer is not related to any of the manufacturers and that it does not share any of its commissions with the manufacturers. Buyer does not maintain an inventory of merchandise in Hong Kong for Importer.

Further, Importer has submitted copies of invoices from the foreign manufacturers to Buyer setting forth the actual price of the merchandise and copies of Buyer's invoices to Importer setting forth the ex-factory price of the merchandise, freight and shipping charges, and its buying commission.

Holding: On the basis of the information submitted, we are of the opinion that there is sufficient evidence to support a finding that Buyer acts as a *bona fide* buying agent for Importer and that the commission paid to Buyer for these services should be excluded from the dutiable value of the merchandise.

(C.S.D. 83-108)

This ruling holds that duties on repairs by regular crew members using parts manufactured in the United States and purchased abroad are remissible under 19 U.S.C. 1466(d)(2), notwithstanding 19 CFR 4.14(c)(3)(ii)

Date: July 20, 1983
File: VES-13-18-CO:R:CD:C
106214 JM

This ruling concerns a petition for relief from the duty incurred under 19 U.S.C. 1466 on the cost of foreign repairs to an American vessel.

Issues: 1. Whether the repairs to the vessel in a foreign country were necessitated by stress of weather or other casualty while the vessel was in the regular course of her voyage, thus making duties thereon remissible pursuant to 19 U.S.C. 1466(d)(1).

2. Whether certain repairs to the vessel were accomplished by United States residents, or regular members of the crew, using parts manufactured or produced in the United States, thus making duties thereon remissible pursuant to 19 U.S.C. 1466(d)(2).

Facts: The subject vessel arrived in the United States on September 30, 1979, at Panama City, Florida, from Port-of-Spain, Trinidad. Vessel Repair Entry No. 80-700004-1 was filed showing that repairs were made to the vessel on seven occasions during 1978 and 1979 at two ports in Brazil. The subject vessel, constructed of aluminum and used for ocean bottom research, operated off the coast of Brazil from December 1978 to August 1979.

The vessel's owner filed an application for relief from duty on the cost of repairs, submitting 9 enclosures in support of its claim. Each of the first seven enclosures related exclusively to one of the seven occasions on which the vessel was repaired. After the application for remission was partially denied, a petition for relief was filed which contained additional information in the first seven enclosures.

Enclosure 1 covers repairs to the starboard auxiliary engine in Fortaleza, Brazil. These repairs were made by regular members of the crew using parts which were manufactured in the United States and purchased by the vessel in Brazil.

Enclosure 2 covers repairs to the port auxiliary generator by a repair shop in Fortaleza. The petitioner states that the failure "occurred when fiberglass insulation which covers the wiring in the generator wore off, thus causing the wire to short out on the metal frame."

Enclosure 3 covers maintenance repairs and repairs to the vessel's hull and cycloidal propeller blade in Rio De Janeiro, Brazil. The petitioner offered evidence that damage to the propeller blade occurred when the blade contacted the anchor chain during heavy winds. The petitioner states that the exact cause of the hull cracks, which were repaired by a United States resident flown to Brazil for that purpose, is not known. While Enclosure 3 filed with the application stated the bent blade was replaced by ship's personnel, the first invoice (Enclosure 3, petition) contains item 2.20 SUBSTITUTION OF WOITH BLADE and item 2.29 GRINDING OF BLADE.

Enclosure 4 covers repairs to the starboard main engine in Rio De Janeiro. The petitioner states that the damage was caused by defective valve springs which were later found by the manufacturer to be unsuitable for use in the engine.

Enclosure 5 covers repairs to the starboard auxiliary generator by a repair shop in Rio De Janeiro. Petitioner states that this failure was caused by the same problem with fiberglass insulation discussed in Enclosure 2. In addition, Enclosure 5 covers hull damage repaired by a United States resident and allegedly incurred when the vessel contacted the dock in Rio De Janeiro.

Enclosure 6 covers repairs to the two blowers on the starboard main engine by a repair shop in Rio De Janeiro. The petitioner states that "a bearing suddenly failed, thus causing two moving parts in the blower to collide."

Enclosure 7 covers repairs to the starboard auxiliary engine and the two main engines by a repair shop in Rio de Janeiro. The petitioner states that the damage to the main engines "was due to metal fatigue in the valve spring, a problem discussed in Enclosure 4." The petitioner states that failure of the auxiliary engine resulted from the use of lubricating oil with an unacceptable sulphate ash content which clogged the engine with carbon. The petitioner

gives no explanation concerning the cause of hull cracks also covered by Enclosure 7 which was repaired by United States residents.

The petitioner requests relief claiming that certain repairs necessitated by casualty were required for the safety and seaworthiness of the vessel and that certain repairs were effected by United States residents or regular members of the vessel's crew, using parts manufactured or produced in the United States.

Law and analysis: Title 19, United States Code, section 1466, provides in pertinent part for payment of an ad valorem duty of 50 percent of the cost of foreign repairs to a vessel documented under the laws of the United States to engage in the foreign or coastwise trade. Subsection 1466(d)(1) provides that the Secretary of the Treasury is authorized to remit or refund such duties if the owner or master of the vessel furnishes good and sufficient evidence that the vessel was compelled, by stress of weather or other casualty, to put into such foreign port and make repairs to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination. Subsection 1466(d)(2) provides that the Secretary of the Treasury is authorized to remit or refund vessel repair duties if the master or owner furnishes good and sufficient evidence that the repair parts or materials were manufactured or produced in the United States, and the repairs were performed by United States residents or by members of the regular crew of the vessel.

In C.I.E. 1257/60, we held that the fact that repair material used in accomplishing repairs is of United States manufacture is irrelevant unless the work is performed by residents of the United States or by regular members of the crew of the vessel within the contemplation of section 3115(2), Revised Statutes (19 U.S.C. 1466(d)(2)). With the exception of repairs listed below in this paragraph, the repairs to the subject vessel were performed by foreign labor and are not remissible under section 1466(d)(2). The petitioner has furnished documents to show that members of the regular crew used parts which were manufactured in the United States and purchased in Brazil to repair the starboard auxiliary engine (Enclosure 1). In addition, United States residents repaired the hull cracks covered by Enclosures 3, 5 and 7. Accordingly, the duty on the cost of these repairs is remissible under (19 U.S.C. 1466(d)(2)).

We are aware of the fact that section 4.14(c)(3)(ii), Customs Regulations (19 CFR 4.14(c)(3)(ii)) states that parts and equipment manufactured in the United States and installed by United States residents or members of the regular crew must be purchased by the owner of the vessel in the United States to qualify for remission. We also note that 19 U.S.C. 1466(d)(2), the statutory basis for section 4.14(c)(3)(ii), does not require that such parts and equipment be purchased in the United States in order to qualify for remission. We are presently reviewing Part 4 of the Customs Regulations preparatory to a possible revision of that Part. (See General Notice published in the Federal Register on June 10, 1983 (48 FR 26831;

Vol. 17, CUSTOMS BULLETIN, No. 25, page 8, June 22, 1983). We have noted and intend to correct this discrepancy in the proposed revision to Part 4.

The failure of the auxiliary generators (Enclosure 2 and 5) due to worn insulation, the failure of a bearing resulting in damage to two blowers (Enclosure 6) and the failure of the starboard auxiliary engine (Enclosure 7) are attributable to normal wear and tear rather than a casualty. In Customs Decision 79-32, we held that a breakdown in machinery may not be regarded as a casualty within the purview of the vessel repair statute in the absence of a showing that the breakdown or failure was caused by some extrinsic force. The petitioner has offered no evidence that the auxiliary generators and the blowers broke or failed due to some extrinsic force.

With respect to repairs to the cycloidal propeller blade, the petitioner has offered good and sufficient evidence that those repairs were necessitated by casualty. Accordingly, duty on the cost of repairs to the propeller (Enclosure 3) are remissible under 19 U.S.C. 1466(d)(1).

The petitioner indicates that the failure of the starboard main engine (Enclosure 4) and the two main engines (Enclosure 7) resulted from a latent defect in the valve springs rather than normal wear and tear. Generally, a latent defect can be said to be a deficiency in vessel equipment which is essential to the proper use of the equipment for the purpose for which it is to be used and which would not have been reasonably determined from an ordinary inspection. Headquarters has considered latent defects to be casualties in prior rulings and has granted relief when satisfied by the evidence that damage was conclusively caused by a latent defect. The petitioner's statement that the valve springs were defective, unsupported by documentary evidence, does not constitute conclusive evidence that damage to the main engines was caused by a latent defect.

Holding: 1. The petitioner has submitted good and sufficient evidence that members of the regular crew of the vessel used parts manufactured in the United States to repair the starboard auxiliary engine (Enclosure 1) and the United States residents repaired the hull cracks covered by Enclosures 3, 5 and 7. Accordingly, duty on the cost of those repairs is remitted pursuant to 19 U.S.C. 1466(d)(2).

2. The petitioner has submitted good and sufficient evidence that repairs to the vessel's cycloidal propeller were necessitated by stress of weather or other casualty while the vessel was in the regular course of her voyage. Accordingly, duty on the cost of repairs to the propeller is remitted.

While the file contains some evidence that hull repairs covered by Enclosure 5 were necessitated by casualty, these repairs were made by United States residents and remitted above under 19

U.S.C. 1466(d)(2). Accordingly, a determination concerning the cause of this hull damage is not required.

Insofar as the remaining repairs are concerned, the petitioner has not submitted good and sufficient evidence that these repairs were necessitated by stress of weather or other casualty while the vessel was in the regular course of her voyage. Accordingly, duty on the cost of these repairs is not remitted.

We note that certain charges, for example, transportation costs and drydocking charges, have been properly held nondutiable in the proposed liquidation of this entry.

U.S. Customs Service

General Notice

19 CFR Part 151

Petition Concerning the Classification of Imported Grape Juice

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of receipts of petition.

SUMMARY: Customs has received a petition from an importer of grape juice concentrate, contending that the average Brix value (amount of sugar in solution) of natural unconcentrated *vitis vinifera* grape juice in the trade and commerce of the United States, which is currently set forth in the Customs Regulations, is no longer reflective of the quality of such juice and should be changed. This document invites public comment on the petition before any determination is made on this matter.

DATES: Comments must be received on or before (60 days from date of publication).

ADDRESS: Comments (preferably in triplicate) may be submitted to the Commissioner of Customs, Attention: Regulations Control Branch, Room 2426, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT: Lee C. Seligman, Classification and Value Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-8181).

SUPPLEMENTARY INFORMATION:

Background

Item 165.40, Tariff Schedules of the United States (TSUS; 19 U.S.C. 1202) provides for the collection by Customs of a Column 1 rate of duty of 25 cents per gallon on imported grape juice concentrate (not frozen). Headnote 3(a) of Subpart A, Part 12, Schedule 1, TSUS, states that "the term 'gallon' * * * means gallon of natural unconcentrated juice or gallon of reconstituted juice." Headnote 3(b) specifies that "the term 'reconstituted juice' means the product which can be obtained by mixing the imported concentrate with water in such proportion that the product will have a Brix value

equal to that found by the Secretary of the Treasury from time to time to be the average Brix value of like natural unconcentrated juice in the trade and commerce of the United States." Brix value is defined in Headnote 3(c) to be "the refractometric sucrose value of the juice, adjusted to compensate for the effect of any added sweetening materials, and thereafter corrected for acid." Section 151.91, Customs Regulations (19 CFR 151.91), sets forth the average Brix values of natural unconcentrated fruit juices in the trade and commerce of the United States for purposes of the provisions of Schedule 1, Part 12A, TSUS, and is used by Customs in determining the dutiable quantity of imports of concentrated fruit juices.

Customs has received a petition from an importer of grape juice concentrate, contending that the average Brix value of natural unconcentrated *vitis vinifera* grape juice in the trade and commerce of the United States, which is set forth as 18.0 degrees in section 151.91, Customs Regulations, is no longer reflective of the quality of such juice and should be changed.

The petitioner contend that: (1) in order for a determination to be made in this matter the Secretary of the Treasury must consider only the grapes grown in California, which is the sole source of *vitis vinifera* grapes grown in the United States; (2) table grapes and raisin grapes should be eliminated from consideration because they are not found in juice form; and (3) *vitis vinifera* grapes should be divided into two Brix categories, red and white, since those categories are clearly distinct. Based upon the "Final Grape Crush Reports" of the California Department of Food and Agriculture for crops from 1976 through 1981, the petitioner requests that the Secretary make determinations that: (1) the average Brix level is 20.1 degrees for juice from white *vitis vinifera* grapes; and (2) the average Brix level is 22.4 degrees for juice from black (red) *vitis vinifera* grapes. Such determinations would result in a lowering of the duty on these grape juice concentrates.

Before making any determination on this matter, Customs seeks public comment on the proposal and especially on the following issues:

1. Is the production of *vitis vinifera* grape juice exclusive or so predominant to California as to provide the sole source for determination of the average Brix value of such natural unconcentrated juice for purposes of section 151.91, Customs Regulations?

2. If the response to the first question is in the affirmative, does the average Brix value reported in the "Final Grape Crush Reports" of the California Department of Food and Agriculture for crops from 1976 through 1981 constitute a valid basis for the requested determination? Customs notes that the Brix values stated

in those reports are determined in the laboratory from grape samples selected from the hoppers just prior to crushing, and therefore represent the average Brix value of fresh grapes. Brix values of juice can be affected by numerous factors, such as delays in transit and length of storage.

3. Does the term "* * * in the trade and commerce of the United States * * *", as used in Headnote 3(b) of Subpart A, Part 12, Schedule 1, TSUS, encompass only such single strength juice produced domestically, or does it also encompass foreign-produced single strength juice imported into the United states, if any?

4. Is there a separate and distinct trade understanding of *vitis vinifera* grape juice or grapes for concentrating (*e.g.,* wine grapes as opposed to table or raisin grapes) which separates the genre in two specific categories (*i.e.,* white and black (red)) or is the single description currently used reflective of such understanding (*i.e.,* does the color of the grapes from which such juice is produced—white and black (red)—control the use to which each is put or, apart from color and possibly Brix value, are the two used interchangeably, compensating, where necessary, for differing Brix values)?

COMMENTS

Before adopting this proposal, consideration will be given to any written comments timely submitted to the Commissioner of Customs. The petition, as well as all comments received in response to this notice, will be available for public inspection in accordance with section 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Control Branch, Room 2426, Headquarters, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229.

AUTHORITY

This notice is issued under the authority of R.S. 251, as amended, 77A Stat. 14, section 624, 46 Stat. 759 (19 U.S.C. 66, 1202, 1624).

LIST OF SUBJECTS IN 19 CFR PART 151

Customs duties and inspection, Imports, Fruit juices.

DRAFTING INFORMATION

The principal author of this document was Gerard J. O'Brien, Jr., Regulations Control Branch, Office of Regulations and Rulings,

U.S. Customs Service. However, personnel from other Customs offices participated in its development.

ALFRED R. DE ANGELUS,
Acting Commissioner of Customs.

Approved: October 28, 1983.

JOHN M. WALKER, JR.,
Assistant Secretary of the Treasury.

[Published in the Federal Register, November 14, 1983 (48 FR 51784)]

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the U.S. Customs Service is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Customs Service Decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the U.S. Customs Service. Individuals to whom any of these decisions would be of interest should read the limitations expressed in 19 CFR 177.9(c).

A copy of any decision included in this listing, identified by its date and file number, may be obtained through use of the microfiche facilities in Customs reading rooms or if not available through those reading rooms, then it may be obtained upon written request to the Office of Regulations and Rulings, Attention: Legal Retrieval and Dissemination Branch, Room 2404, U.S. Customs Service, 1301 Constitution Avenue, N.W., Washington, D.C. 20229. Copies obtained from the Legal Retrieval and Dissemination Branch will be made available at a cost to the requester of $0.15 per page. Requests for copies must be accompanied by payment in the appropriate amount by check or money order. The cost per ruling (number of pages multiplied by $0.15) is indicated in the right hand column listed below.

The microfiche referred to above contains rulings/decisions published or listed in the CUSTOMS BULLETIN; many rulings predating the establishment of the microfiche system, and other rulings/decisions issued by the Office of Regulations and Rulings. This microfiche is available at a cost of $0.15 per sheet of fiche. In addition, a keyword index fiche is available at the same cost ($0.15) per sheet of fiche.

Additions to both sets of fiche are made quarterly. Requests for subscriptions to the microfiche should be directed to the Legal Retrieval and Dissemination Branch. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: November 4, 1983.

MARVIN M. AMERNICK,
(For B. James Fritz, Director,
Regulations Control and Disclosure Law Division).

Date of decision	Control No.	Issue	Number of pages	Cost
Please note: Prepayment is required for copies of rulings listed below.				
8-18-83	071335	Classification: plug-in-modules consisting of both discrete elements and an integrated circuit chip used in connection with a personal computer are classifiable under the provisions for other parts of computing and other data processing machines in item 676.52, TSUS	1	$0.15
8-24-83	071341	Classification: protest concerning applicability of the GSP to aluminum produced in a beneficiary developing country from imported materials and transformed into the form of ingots and billets prior to importation	8	1.20
9-8-83	071366	Classification: Internal Advice No. 23-83 concerning the classification of four separately imported components of an automatic mask inspection system	2	.30
9-28-83	071371	Classification: Internal Advice No. 12-83 concerning the classification of a speedometer capable of being used on an exerciser or a bicycle without alteration is classifiable under item 711.93, TSUS as a bicycle speedometer	3	.45
8-25-83	071403	Classification: applicability of the GSP to figures produced in Hong Kong, painted in the People's Republic of China and imported from Hong Kong	2	.30
8-8-83	071430	Classification: aluminum lunch pails are classified under item 706.62, TSUS	1	.15
9-28-83	071440	Classification: applicability of the GSP to single and multiple leaf springs made in Korea from steel bars produced in Japan	4	.60
9-8-83	071469	Classification: Internal Advice No. 21-83 concerning the applicability of item 801.00, TSUS, to oil well drilling companies who are users of leased oilwell drilling rigs that were exported to Canada under a lease agreement and returned to the United States. The oilwell drilling equipment would not be entitled to item 801.00, TSUS, relief upon importation	3	.45
9-20-83	071480	Classification: an audio video communications system is classifiable under the provisions covering electrical articles not specially provided for in item 688.43, TSUS	1	15

Date of decision	Control No.	Issue	Number of pages	Cost
9-29-83	071541	Classification: a clock radio with a cradle for a telephone is not an entirety and is classified under item 911.95, TSUS, if valued not over $40.00	2	.30

U.S. Court of Appeals for the Federal Circuit

(Appeal No. 83-649)

THE YOUNG ENGINEERS, INC., (AKA TYE OR TYE, INC.), APPELLANT *v.* UNITED STATES INTERNATIONAL TRADE COMMISSION, APPELLEE

(Decided November 8, 1983)

Joseph E. Mueth, of Los Angeles, California, argued for appellant.

Jane K. Albrecht, of Washington, D.C., argued for appellee. With her on the brief were *Michael H. Stein,* General Counsel and *Michael P. Mabile,* Acting Assistant General Counsel for Litigation.

Before NICHOLS,* and NIES, *Circuit Judges,* and COWEN, *Senior Judge.*

NIES, *Circuit Judge.*

This appeal, in a proceeding under 19 U.S.C. § 1337, raises two novel issues: (1) whether following disapproval by the President of the determination in an investigation, the International Trade Commission must institute a new investigation in order to exercise its authority to issue an exclusion and/or cease and desist order based on previously found unfair acts; and (2) whether, under principles of *res judicata,* a dismissal with prejudice of an infringement suit against appellant precludes a holding that appellant infringes complainant's patents. Our jurisdiction of this appeal is under 19 U.S.C. § 1337(c) and 28 U.S.C. § 1295(a)(6). We answer both questions in the negative in this instance, and, finding no merit in any other defense, we affirm the determinations of the Commission. *Certain Molded-In Sandwich Panel Inserts and Method for Their Installation,* Inv. No. 337-TA-99, USITC Pub. No. 1246, 218 USPQ 832 (1982).

I

The subject investigation is the culmination of a patent controversy between Shur-Lok Corporation (Shur-Lok), complainant, and The Young Engineers, Inc., (TYE) appellant, which goes back many years. Shur-Lok is a domestic manufacturer of devices, called sand-

*Judge Nichols assumed senior status October 1, 1983, following submission of the case.

wich panel inserts, used in aircraft production.[1] Shur-Lok is the owner of three patents associated with the device:

U.S. Patent No. 3,282,015, issued November 1, 1966, covering the device.

U.S. Patent No. 3,271,498, issued September 6, 1965, and U.S. Patent No. 3,392,225, issued July 9, 1968, both covering methods of installing inserts in the sandwich panels.

TYE has been importing sandwich panel inserts from Japan since the mid-60's. After Shur-Lok charged TYE with selling infringing inserts, apparently TYE began importing a modified device. Shur-Lok objected to the latter as well and, in 1969, filed suit in the United States District Court for the Central District of California, Civil Action No. 69-265, charging infringement of the patents which are the basis for the § 1337 investigation.

Specifically, Shur-Lok charged TYE with directly infringing Shur-Lok's U.S. Patent No. 3,282,015 for the insert and with actively inducing others to infringe U.S. Patent Nos. 3,271,498 and 3,392,225. Shur-Lok's complaint prayed for both a permanent injunction against future infringement and damages for past infringement.

TYE answered the complaint alleging that the patents were invalid and not infringed and also asserted these defenses in declaratory judgment counterclaims. Following discovery by way of depositions, document productions, and interrogatories, trial was set to commence in the district court on July 11, 1972. However, on July 6, 1972, Shur-Lok moved to postpone the trial, expressly seeking either to attempt settlement of the suit or "to voluntarily dismiss the action with prejudice."

On July 11, 1972, Shur-Lok filed its "Motion to Dismiss with Prejudice" pursuant to Fed. R. Civ. P. 41(a)(2) which allows dismissal only upon "such terms and conditions as the court deems proper." Shur-Lok represented to the court that the industry had greatly deteriorated during pendency of the suit, that TYE's infringement of the patents did not justify the expense of the trial, and that TYE could expect no more favorable judgment than if the suit were tried, unless the patents were held invalid. TYE objected to dismissal, *inter alia*, seeking recovery of its considerable attorney fees. At the hearing, the court stated in granting the motion:

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[1] A sandwich panel is a lightweight structure formed by securing a honeycomb core between two skin sheets. Sandwich panels are used in the construction of lavatories, galleys, walls, floors, control surfaces and other parts of aircraft. Sandwich panel *inserts*, the products in issue, are used for anchoring attachments onto the panels. The inserts are inserted into a sandwich panel and anchored into place by a "potting" compound. Each insert has an injection port for insertion of the potting compound, and a venting and an inspection port. A threaded bore provides means for mechanical attachment.

The accused devices which were apparently sold by TYE had either two or three ports. The findings of fact suggest that only three port devices were sold by TYE at the time of the 1969 infringement action, although this fact is disputed by TYE.

Apparently other models of the device, two port devices, were imported by TYE some seven or eight years after the 1972 dismissal. Both two and three port devices were the subject of the Commission investigation.

> Plaintiff in this case cannot bring a suit against this Defendant involving any of the issues of validity of the patent or the claims of the patent here * * *.
>
> [T]he counterclaim is dismissed without prejudice that the Defendants can at any time, in the event they feel any injury or damage, sue the Plaintiffs again.

The final judgment, entered July 25, 1972, simply dismissed the complaint with prejudice and the counterclaims without prejudice. Thereafter, TYE continued its importation of inserts of various designs without objection from Shur-Lok.

On March 27, 1981, Shur-Lok initiated the present proceedings before the Commission by filing a complaint alleging, *inter alia,* that TYE and five purchasers [2] from TYE were in violation of § 337 of the Tariff Act of 1930 (19 U.S.C. § 1337(a)) [3] because of unfair acts, namely, infringement of Shur-Lok's patents, in the importation and sale of the devices. Shur-Lok also charged TYE with misappropriation of trade secrets but this charge was dropped early in the investigation. The Commission instituted Investigation No. 337-TA-99 on April 29, 1981. The complaint and notice of investigation were amended on August 7, 1981, to add as respondents, the Japanese manufacturer of the subject imports, Hariki Metal Industries, and the exporter, Kyoei Trading Corporation of Japan.

In its answer to Shur-Lok's complaint, TYE raised the affirmative defenses of *res judicata,* laches, and estoppel, all in essence based on the prior litigation. Prior to the hearing on the merits, TYE moved for summary determination on the grounds that the investigation was precluded by the *res judicata* effect of the 1972 judgment. The administrative law judge (ALJ) denied the motion, after consideration of the record of the prior litigation, on the grounds that the civil action and the Commission proceeding were separate causes of action and that there was not complete privity between the parties in the civil action and the Commission proceeding. Thereafter, an evidentiary hearing on the merits of the complaint was held before the ALJ. TYE did not appear or participate in that phase of the proceedings. The ALJ found that the asserted patents were valid and infringed and these findings were adopted by the Commission. The Commission also held that the proceeding was not barred by the doctrine of *res judicata* and that TYE waived its defenses of laches and estoppel.

To implement its determination of § 1337 violations, the Commission issued a general exclusion order prohibiting the importation of infringing inserts for the remaining life of the '015 patent; a cease

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[2] The five domestic purchasers of the subject inserts include C & D Plastics, Hitco Corporation, Composites Unlimited, U.O.P Aerospace, and Weber Aircraft.

[3] 19 U.S.C. § 1337(a) reads:

(a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

and desist order prohibiting TYE from selling imported inserts acquired subsequent to institution of the investigation where such sales would contribute to or induce infringement of the '225 and/or '498 patents; and cease and desist orders to three of TYE's customers Weber Aircraft, Hitco and U.O.P. Aerospace, prohibiting their use of the imported inserts.

Following action in an investigation, the ITC must forward the matter to the President who may disapprove the ITC action for policy reasons. 19 U.S.C. § 1337(g)(2). In this case the President exercised that authority, transmitting his disapproval of the Commission's determination on June 28, 1982. Pertinent portions of the President's notice of disapproval state:

> The effect of the cease and desist orders directing the three purchasers not to use imported products when practicing a process in the United States that infringes a process patent may not be in compliance with U.S. international obligations. The orders may result in less favorable treatment in requirements affecting purchase and use being accorded imported products than treatment being accorded domestic products. The three orders do not stop infringement of the process patents in the U.S. Because of the statutory limits on USITC jurisdiction, those orders can only act as restrictions on the purchase and use of the imported products.
>
> My disapproval of the USITC determination in this case in no way circumscribes the USITC authority to issue cease and desist orders. Cease and desist orders are more flexible remedies than exclusion orders and are appropriate in cases where an importer is the wrongdoer. The discriminatory effect upon imported products of the three orders directed to the users of those products forms the basis of my decision to disapprove in this case.

Since the rationale for the President's disapproval was limited to the three cease and desist orders directed to domestic users, on August 3, 1982, the Commission issued a notice proposing "modification" of the determination disapproved by the President. Of particular importance here, the Commission did not reopen the record on the merits or otherwise institute a new investigation. In issuing this notice, the Commission denied the request of the complainant Shur-Lok that the Commission initiate a new investigation. TYE also objected to the procedure, but on the ground that such action was out of time, that is, contrary to the one year statutory period mandated by 19 U.S.C. § 1337(b)(1) for completion of an investigation, and on the ground that the Commission's failure to reopen the investigatory record was contrary to due process and the Administrative Procedures Act.

After the submission of comments by Shur-Lok and TYE, the Commission voted on September 8, 1982, to modify its findings on remedy, the public interest, and bonding to be consistent with the policy considerations underlying the President's disapproval of the

original remedy determination. On September 17, 1982, the Commission issued the following orders:

> (1) A general exclusion order prohibiting the importation of infringing inserts for the remaining life of U.S. Patent No. 3,282,015; and
>
> (2) A cease and desist order directed to TYE prohibiting it from selling imported inserts acquired subsequent to institution of the investigation where such sales would contribute to or induce infringement of U.S. Patent Nos. 3,271,498 and/or 3,392,225.

The matter was again submitted to the President, no disapproval resulted (although the Commission's procedure was questioned), and the determination thus became final for purposes of appeal.

II

Procedure

The initial question raised by this appeal is whether presidential disapproval of the determination in this investigation terminated the investigation for all purposes.

In *Aktiebolaget Karlstads Mekaniski Werkstad* v. *USITC.*, 705 F. 2d 1565, 1578, 217 USPQ 865, 874–75 (Fed. Cir. 1983), (hereinafter *Headboxes* case) this court approved the procedure where, following presidential disapproval, the ITC instituted where, following presidential disapproval, the ITC instituted a second investigation, "salvaged from the first investigation * * * the record and the findings and conclusion of the presiding officer [*i.e.*, the administrative law judge]," and set up a procedure whereby evidence concerning new issues could be added to the record.

The shortcut taken here removes an additional step. The ITC did not start a second investigation but treated the investigation as an open and pending matter in connection with which orders could be issued to effectuate a remedy. Moreover, the record on the merits was not reopened although written comments on the "modified" remedy were received.

The problem arose here as in *Headboxes* because the investigation concerned a number of related but distinct acts of unfair competition. It is the practice of the ITC to consider such charges in a single "investigation" and to present a single "determination" and what might be called a "single composite remedy" to the President. Even though the statute is clear that an exclusion order and a cease and desist order are alternative remedies,[4] the Commission has adopted the view that § 1337(f)(1) is not an absolute bar to both

[4] 19 U.S.C. § 1337(f)(1) provides:

In lieu of taking action under subsection (d) or (e) [permanent and interim exclusion orders], the Commission may issue * * * an order directing such person to cease and desist from engaging in the unfair methods or acts involved. [Emphasis added.]

kinds of orders in a single investigation when the conclusion is reached that there are various unfair acts.

With respect to the propriety of both types of orders in this case, the Commission ruled:

> Issuance of the orders discussed above does not conflict with the "in lieu of" language of section 337(f) or with the Commission decision in *Doxycycline* [38] because the various orders are directed at different unfair acts. The general exclusion order is aimed at infringement of the '015 *product* patent. The cease and desist orders issued against Hitco, Weber aircraft, and UOP Aerospace are aimed at *direct* infringement of the two method patents. The cease and desist order issued against TYE is directed at *induced* and *contributory* infringement of the method patents. Thus, this case is analagous to the *Stoves I* [39] investigation where the Commission issued both an exclusion order and cease and desist orders, but directed at separate and distinct unfair acts.

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[38] Inv. No. 337–TA–3, Doxycycline, USITC Pub. 964 (April 1979). Commissioner Stern does not reach the issue of whether there are different unfair acts. See opinion of Commissioners George M. Moore and Paula Stern, concurring in part and dissenting in part, Doxycycline, p. 22.

[39] Inv. No. 337–TA–69, Certain Airtight Cast-Iron Stoves, USITC Pub. 1126 (Jan. 1981). [Emphasis in original.]

A somewhat similar problem arising from a "partial" termination of an exclusion order was discussed in *SSIH Equipment Co.* v. *USITC*,— F. 2d —, 218 USPQ 678, 683, n. 8 (Fed. Cir. 1983), note 8 (*SSIH II*):

> S–W does not assert that an exclusion order could not be terminated in part. Such a position would raise only a formalistic, not substantive, objection. By practice, the Commission issues exclusion orders covering several independent bases for exclusion of goods rather than separate exclusion orders for each. The multiple based approach was taken here in that goods infringing any *one* of the claims were excluded. Thus, in practical effect, the June 19 order may be thought of as separate orders on each claim, only two of which were not terminated on August 10. While the Commission's order of August 10, 1981, was phrased in terms of "suspension" of a portion of the earlier order, its effect was partial termination. We are not bound to consider it anything less because of the words used. *Cf. Rohm & Haas Co.* v. *USITC*, 554 F. 2d 462, 463, 193 USPQ 693, 694 (CCPA 1977) (Commission order granting motion to dismiss without prejudice held with prejudice).

As indicated in the presidential disapproval letter here, the President had no alternative but to veto the determination although he disapproved only part of the remedy. Had each violation been set forth separately with its appendant remedy, and sent to the President as separate determinations, the President would have been in a position to disapprove only the determination con-

nected with the cease and desist orders which he found unacceptable. Thus, on the facts of this case as in *SSIH II,* we believe that it would be formalistic to upset the action taken by the Commission unless the statute leaves no alternative.

With respect to the statutory effect of presidential disapproval, the principal dispute between the parties is over the interpretation of § 1337(g)(2) which reads:

> (2) If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section with respect thereto shall have *no force or effect.* [Emphasis added.]

In TYE's view "no force or effect" means null and void. The Commission argues that since the President can disapprove only for policy reasons, the determination, including the orders, remains valid but ineffective. TYE counters that, even if that view were accepted, the ITC in this case did not meet the statutory time limitation of one year to complete an investigation inasmuch as the orders issued more than a year after the investigation began. The ITC answers that it has authority under 19 U.S.C. § 1337(h) and 5 CFR § 211.57 to change its orders after the twelve month period. For convenience we will dispose of the last two arguments first.

A

Contrary to the ITC's view, we see no authority in § 1337(h) to support the action by the Commission here.

Section 1337(h) reads:

> *Period of Effectiveness*
>
> (h) Except as provided in subsections (f) and (g) of this section, any exclusion from entry or order under this section shall continue in effect until the Commission finds, and in the case of exclusion from entry notifies the Secretary of the Treasury, that the conditions which led to such exclusion from entry or order no longer exist.

5 CFR § 211.57, which implements this provision, in relevant part reads:

> (a) Whenever any person believes that changed conditions of fact or law, or the public interest, require that *a final Commission action* be modified or set aside, in whole or in part, such person may file with the Commission a motion requesting such relief. *The Commission may also on its own initiative consider such action.* [Emphasis added.]

The Commission reasoned that a determination is "final" on conclusion of an investigation, that is, before action by the President.

A precedential interpretation on this point was made in *SSIH II*, — F. 2d at —, 218 USPQ at 683, in which this court held that the statute provides that an ITC determination (including remedy) becomes *effective* upon publication in the Federal Register, that is, prior to submission to the President, but is not *final* until presidential approval is given or the 60-day period for review expires without disapproval. As stated therein:

> S-W confuses the "effectiveness" of a determination with its "finality." While Commission determinations are not *final* for purposes of appeal to this court until the review period has run, they are otherwise "effective upon publication * * * in the Federal Register," Section 337(g)(2). During the Presidential review period, products are in fact excluded from entry except under bond.

Thus, Commission orders are "effective" before they are "final," not "final" and then "effective."

Reliance on the authority of § 1337(h) to "modify" an order which is no longer in effect after presidential disapproval is, thus, misplaced. It seems beyond argument that § 1337(h) relates to an order in effect and how long it will "continue in effect." Moreover, this section explicitly recognizes that an order is no longer in effect at an earlier date if disapproved by the President under § 1337(g). Thus, the exclusion order and cease and desist orders having been rendered of no effect under § 1337(g), there simply was no order thereafter to "continue in effect." What the Commission actually did was *to issue* new orders. No authority can be found in § 1337(h) to issue exclusion orders but only to end the effectiveness of an outstanding order where "the conditions which led to such exclusion from entry or order no longer exist." 5 CFR § 211.57 cannot, and does not, provide greater authority than the statute. Moreover, § 211.57 itself speaks of "final Commission action"—a condition that the original orders never achieved. Thus, to this extent, the Commission's analysis must be rejected.

B

On the other hand, we also reject TYE's argument that the subject orders are *ultra vires* because untimely under § 1337(b). This section provides, in pertinent part:

> 1337(b)(1) The Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative. Upon commencing any such investigation, the Commission shall publish notice thereof in the Federal Register. The Commission shall conclude any such investigation, and make its determination under this section, at the earliest practicable time, but not later than one year (18 months in more complicated cases) after the date of publication of notice of such investigation.

If the "determination" which the Commission must "make" within the year includes the issuance of its remedy orders, TYE's position

would be correct. However, the legislative history of the Trade Reform Act of 1974 suggests that "determination" in § 1337(b) means only the conclusion that there is a violation or no violation of § 1337(a).[5] The word "determination" appears in other paragraphs of § 1337, but its meaning is confused rather than clarified by comparison of the various clauses in which it appears. In subsections (d) and (e) (providing authority to issue exclusion orders) "determination" again appears to encompass only the holding of violation under subsection (a), whereas in subsection (c), remedy is referred to as a "finding" but, anomalously, the paragraph also refers to "a determination" under (d), (e), or (f). Subparagraph (f) clearly relates only to remedy, i.e., issuance of a cease and desist order in lieu of an exclusion order under (d) or (e). Thus, remedy could itself be considered a separate "determination."

Provided with no clear meaning of "determination" in the statute, we defer to the Commission's interpretation that § 1337(b)(1) time limitations are satisfied if the Commission completes its investigation, makes a determination of "violation," and issues an initial remedy order within the prescribed time period (19 CFR § 210.15).

In reaching this conclusion, we have taken into consideration TYE's argument that the time limitations are designed to provide a time frame for the unfair acts. We do not agree with this premise. Since the time period is coupled with a direction to complete an investigation as soon as possible, it seems clear that its purpose is to insure speedy relief.

C

Returning to the initially posed issue of the meaning of "no force and effect" in § 1337(g)(2), we again agree with the Commission that the validity of its determination of violation is unaffected by presidential disapproval. The President may disapprove only "for policy reasons," not because of the merits of an investigation.

As indicated above, the determination and initial remedy are effective immediately. Goods are excluded unless and until disapproval by the President. Thus, "no force or effect" can be given a meaning less forceful than "null and void" and have substantial purpose in the statute. After disapproval, the determination of violation, which by § 1337(b) mandates exclusion of goods, becomes ineffectual. That determination, however, does not thereby become void.

Thus, we see not basic impediment in the statute to treating the proceeding as pending and allowing a new remedy order to be issued on the basis of the determination of violation previously made. Requiring a second investigation would place a merely formalistic barrier in the way of expeditious relief.

[5] Sen. Rep. No. 1298, 93rd Cong., 2d Sess. (1974):

Section 337(b)(1) of the Act, as amended by the bill, * * * would provide that upon commencing an investigation under section 337, the Commission would publish notice thereof, and conclude such investigation and determine whether section 337 is being violated within one year from the date of publication, or in more complicated cases, within 18 months.

Also, we see no circumstance here which indicates any basic unfairness in the Commission's procedures. The new orders were promptly issued after presidential disapproval; no more was done than eliminate some of the previous cease and desist orders; and no new issues requiring a hearing were asserted by any person who would be adversely affected. While TYE did assert that a hearing should have been held by reason of the "evaporation" of Shur-Lok's case, this assertion is premised on the erroneous view that a violation can only be predicated on conditions during the one year preceding issuance of an exclusion order, a view we reject. *Bally/Midway Manufacturing Co.,* v. *USITC,* — F. 2d —, 219 USPQ 97, 100 (Fed. Cir. 1983). Thus, we find no violation of the statute or due process in the procedure followed.

III

Res Judicata

This appeal raises another issue of first impression, specifically, what effect, under principles of *res judicata,* a final judgment of a federal district court in prior patent infringement litigation should be given in a subsequent § 1337 proceeding.

In this case the "unfair methods of competition and unfair acts" found to be prohibited by 19 U.S.C. § 1337(a) are predicated on patent infringement. While three patents are involved, for analysis we need only consider the '015 patent which consists of one claim directed to the product, i.e., the insert itself. This patent was held by the Commission to be infringed by the inserts imported by TYE, and the acts of TYE, thus, were found to be proscribed by § 1337(a). As indicated, the same patent was asserted by Shur-Lok against TYE in the district court litigation which ended by a dismissal with prejudice prior to trial. On the basis of the final judgment in its favor in that case, TYE asserts that Shur-Lok is wholly barred from relief in this proceeding.

The Commission found that the § 1337 investigation was not the same "cause of action" as the court case, stating that "the acts complained of here all happened *subsequent* to dismissal of the court case, and are apparently occurring on a larger scale" and because "TYE has introduced 8 new models of imported inserts within the last 18 months." The Commission then found the facts here comparable to those in *Lawlor* v. *National Screen Service Corp.,* 349 U.S. 322 (1955), where a second antitrust suit was held to be not barred because the acts complained of in the second suit were all subsequent to the first, the acts were "new" violations of a different nature and the defendant's monopoly had substantially increased. The Commission did not rely on the additional factors that the proceeding was based on a different statute giving rise to a remedy not available in the civil suit and involved the Government

as a party, although these points are made in the Government's brief on appeal.

A

As an initial matter we note some confusion in the arguments of the parties in use of the terms "*res judicata,*" "collateral estoppel," "cause of action," and "claim" and "issue" preclusion. In our analysis we will be guided by the *Restatement (Second) of Judgments* (1982) which, in introductory note to § 13, provides the following basic statement:

> The principal concepts developed in this Chapter are: merger—the extinguishment of a claim in a judgment for plaintiff (§ 18); bar—the extinguishment of a claim in a judgment for defendant (§ 19); and issue preclusion—the effect of the determination of an issue in another action between the parties on the same claim (direct estoppel) or a different claim (collateral estoppel) (§ 27). The term "res judicata" is here used in a broad sense as including all three of these concepts. When it is stated that "the rules of res judicata are applicable," it is meant that the rules as to the effect of a judgment as a merger or a bar or as a collateral or direct estoppel are applicable.

The parties do not dispute that principles of "claim" preclusion, not "issue" preclusion, apply in this case.[6] A critical difference between these concepts is that issue preclusion operates only as to issues actually litigated, whereas claim preclusion may operate between the parties simply by virtue of the final judgment. Thus, principles of merger and bar may apply even though a judgment results by default, consent, or dismissal with prejudice although care must be taken to insure the fairness in doing so. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* §§ 4419, 4442, 4443 (1981).

In this case, no issues were actually litigated in the prior suit. Thus, no "issue" can be said to have been determined or precluded. Therefore, if *res judicata* applies, it can only rest on principles of claim preclusion, that is, that the prior judgment *bars* the same "claim."

The concept of a "claim" is described in § 24 of the *Restatement* as follows:

> **§ 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"**
>
> (1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§ 18, 19), the claim extinguished includes

[6] It should be noted that the quotation from the *Restatement* speaks in terms of *claims* and does not make reference to "causes of action." In some instances, a "cause of action" may be the equivalent of a "claim," but generally, reference to a "cause of action" in this connection leads to consideration of what have come to be regarded as irrelevant matters. *See Alyeska Pipeline Service Co.* v. *United States,* 688 F. 2d 765, 769–71 (Ct. Cl. 1982) and *Container Transport International Inc.* v. *United States,* 468 F. 2d 926, 928–29 (Ct. Cl. 1972), which follow the *Restatement* terminology and analysis.

all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what grouping constitutes a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Claim preclusion, where found, operates to bar subsequent assertion of the same transactional facts in the form of a different cause of action or theory of relief. Generally, this principle rests on the assumption that all forms of relief could have been requested in the first action. Again, the *Restatement* counsels:

§ 26(c). Where formal barriers existed against full presentation of claim in first action (Subsection (1)(c)).

The general rule of § 24 is largely predicated on the assumption that the jurisdiction in which the first judgment was rendered was one which put no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery or demands for relief that might have been available to him under applicable law. When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first.

The formal barriers referred to may stem from limitations on the competency of the system of courts in which the first action was instituted, or from the persistence in the system of courts of older modes of procedure.* * *

In this case, it is indisputable that the relief available in a § 1337 proceeding by way of total exclusion of foreign infringing merchandise was not available in the district court. Thus, it could be argued that no claim preclusion can ever apply in a § 1337 proceeding as a result of a judgment in a prior civil litigation. However, the evils of vexacious litigation and waste of resources are no less serious because the second proceeding is before an administrative tribunal. Moreover, the *Restatement* conclusions are directed to cases involving a second proceeding before another court, not before an administrative tribunal. Some adaptation of claim preclusion appears desirable, indeed necessary, in its application to administrative proceedings, but little guidance can be found in any authorities in such situations. The Commission itself did not rely simply on the unavailability of the § 1337 remedy in the court proceeding as, *ipso facto,* resolving the issue of preclusion, but rather took a more pragmatic approach with which we are generally in agreement.

In patent-based § 1337 proceedings, a pragmatic approach seems particularly appropriate. If a patent owner has unsuccessfully at-

tacked an alleged infringer for the same infringing acts in a prior court proceeding, no substantive argument has been advanced as to why the patent owner should be given an opportunity to put forth the same charge of infringement again. The alleged infringer is as burdened by the litigation before the Commission as before a court. Moreover, if a second court proceeding would be precluded, there seems no reason that the Commission must devote time and attention to that matter. That "phase" of his claim is not one "which he was disabled from presenting in the first" action. (*Restatement, supra.*)

As stated in *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 401 (1981):

> This Court has long recognized that "[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties." *Baldwin* v. *Traveling Men's Ass'n.,* 283 U.S. 522, 525 (1931).

It is correct that a § 1337 proceeding is not purely private litigation "between the parties" but rather is an "investigation" by the Government into unfair methods of competition or unfair acts in the importation of articles into the United States. Significantly, however, any determination of unfair acts is dependent upon the private rights between parties in the position of complainant and respondent. The 1975 amendment of the statute which added the provision in § 1337(c), "All legal and equitable defenses may be presented in all cases" was a major change which reflects a recognition that essentially private rights are being enforced in the proceeding. Were we to adopt the view that there is no bar to the reassertion of the same factual basis for relief simply because the Government is a party or the relief was not available in the first proceeding, we would effectively negate a significant defense which otherwise could be determinative of private rights. Moreover, if a complainant's infringement claim has been judicially settled and there is a legal right in the respondent to do the act claimed to be infringing, there would be no legitimate basis for the Commission's finding that such acts are "unfair." The additional requirements for relief in a § 1337 proceeding, e.g., that the patent must be the basis for a domestic industry, narrow the class of patent owners entitled to its benefits. Such requirements do not express an overriding independent governmental interest which insulates the Government from private defenses between parties, but rather these provisions restrict the instances in which relief can be granted.

Thus, we conclude that where the "infringement claim" which is the basis for the § 1337 investigation is a claim which would be barred by a prior judgment if asserted in a second infringement suit, that infringement claim may also be barred in a § 1337 proceeding.

B

The second and determinative issue here is whether the same infringement claim is being relitigated.

TYE argues that it has engaged in a continuing course of conduct which is the same—or substantially the same—as that attacked in the civil litigation. Moreover, the 1969 complaint sought all-encompassing relief against any and all acts of future infringement of the '015 patent. Thus, it is TYE's position that the dismissal with prejudice precludes any litigation against TYE based on the '015 patent. In effect, TYE would have us consider TYE to be a licensee. As such, no finding of unfair acts could be predicated on its importation of inserts which infringe the '015 patent, whether the products are the same or different from those involved in the suit. In this connection, we note that TYE did not seek to prove that the presently imported inserts are the same as those at issue in the civil action. Nor does TYE assert that the '015 patent was invalidated as a result of the suit. Rather, its defense rests purely on the theory that every charge of infringement against TYE based on the '015 patent is precluded.

Even under the broad view that a claim may embrace continuing conduct subsequent to the judgment, we find no authority that claim preclusion would apply to conduct of a different nature from that involved in the prior litigation. *Lawlor* v. *National Screen Service Corp., supra,* is clearly to the contrary.

With respect to patent litigation, we are unpersuaded that an "infringement claim," for purposes of claim preclusion, embraces more than the specific devices before the court in the first suit. Adjudication of infringement is a determination that a thing is made, used or sold without authority under the claim(s)[7] of a valid enforceable patent. Thus, the status of an infringer is derived from the status imposed on the thing that is embraced by the asserted patent claims, the thing adjudged to be infringing. By the same token, where the alleged infringer prevails, the accused devices have the status of noninfringements, and the defendant acquires the status of a noninfringer to that extent.[8] We reject TYE's theory that under principles of *res judicata* it became an unfettered licensee.

As the proponent of the defense of claim preclusion, the burden was on TYE to establish the defense by showing that the devices here were the same as those in the 1969 suit. TYE made no attempt to do so, resting its case on the legal theory that any charge of infringement based on the patent is barred, a clearly untenable position. Moreover, the Commission found that at least some of the devices before it were "new" models. The latter fact makes the case similar to *Lawlor* v. *National Screen Service Corp., supra,* where

[7] It is unfortunately necessary to use the word "claim" here in a different sense.
[8] *See Molinaro* v. *AT&T,* 460 F. Supp. 673 (E.D. Pa. 1978), *aff'd* 620 F.2d 288 (3rd Cir. 1980).

the purportedly similar series of acts were found to be in part different in nature. Moreover, that Shur-Lok might have obtained an injunction against TYE which would have prevented the sale of new models (as well as those actually in suit) does not change our view on this matter. As held in *Lawlor* v. *National Screen Service Corp.*, 349 U.S. at 328:

> This conclusion [of no claim preclusion] is unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunction relief which, if granted, would have prevented the illegal acts now complained of.

Thus, *res judicata* in the sense of claim preclusion has not been established. On the above basis, we affirm the decision of the Commission.

III

Laches and Estoppel

We would add that the defense of *estoppel* by the conduct of Shur-Lok is not foreclosed by the above analysis of *res judicata.* However, such estoppel does not arise simply because of the judgment, or because of laches, that is, delay in attacking TYE's subsequent activities.

Estoppel to assert the patent would require (1) an unreasonable and inexcusable delay, (2) prejudice to the defendant, (3) affirmative conduct by the patentee inducing the belief that it had abandoned its claims against the alleged infringer, and (4) detrimental reliance by the infringer. *A.C. Aukerman Co.* v. *Miller Formless Co.*, 693 F.2d 697, 701, 216 USPQ 862, 866 (7th Cir. 1982). TYE failed to submit any evidence to satisfy these requirements—in particular, it wholly failed to show any detrimental reliance or any equities which would make it manifestly unfair to issue the exclusion order or the cease and desist order, both of which operate prospectively only. Indeed, TYE asserts that it is no longer importing the inserts.

Accordingly, the determinations of the United States International Trade Commission are *affirmed.*

AFFIRMED

(Appeal No. 83-871)

CARLINGSWITCH, INC., APPELLANT *v.* UNITED STATES, APPELLEE

(Decided November 8, 1983)

Charles P. Deem, of New York, New York, argued for appellant.

Jerry P. Wiskin, of New York, New York, argued for appellee. With him on the brief were *J. Paul McGrath*, Assistant Attorney General, *David M. Cohen*, Director and *Joseph I. Liebman*, Attorney in Charge International Trade Field Office.

Before BENNETT, MILLER, and SMITH, *Circuit Judges.*

Per curiam.

We affirm the decision of the Court of International Trade granting the Government's motion to dismiss and adopt that court's opinion as our own. *Carlingswitch, Inc. v. United States,* 560 F. Supp. 46 (Ct. Int'l Trade 1983). We note that this case is controlled by *Carlingswitch, Inc. v. United States,* 651 F.2d 768 (CCPA 1981). *See also American Air Parcel Forwarding Co. v. United States,* No. 83-716 (Fed. Cir. October 14, 1983).

United States Court of International Trade

Decisions of the United States Court of International Trade

(Slip Op. 83-109)

ST. REGIS PAPER COMPANY, PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 79-4-00673

Before RAO, *Judge.*

On Plaintiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment

[Plaintiff's motion denied. Defendant's cross-motion denied.]

(Dated October 28, 1983)

Freeman, Wasserman & Schneider (*Louis Schneider, Herbert Peter Larsen,* and *Philip Yale Simons,* on the brief) for the plaintiff.

J. Paul McGrath, Assistant Attorney General, *Joseph I. Liebman,* Attorney in Charge, International Trade Field Office, (*Barbara M. Epstein,* on the brief) for the defendant.

RAO, *Judge:* This civil action involves the proper classification of merchandise described in the invoices as black calendered paper imported from the Federal Republic of Germany entered at New York in 1978. It was classified by the United States Customs Service (Customs) under item 252.90, Tariff Schedules of the United States, as

> Papers, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated;
> * * * * * * *
> Other, not specially provided for:
> * * * * * * *
> Weighing over 18 pounds per ream:
> * * * * * * *
> Other. * * *

with a duty rate of 10 percent ad valorem.

It is the plaintiff's position that the imported merchandise is properly classified under item 252.05, TSUS, as

> Papers, not impregnated, not coated, not surface-colored, not embossed, not ruled, not lined, not printed, and not decorated:
> Basic paper to be sensitized for use in photography. * * *

and is dutiable thereunder at the rate of one percent ad valorem.

Plaintiff further claims that after importation, the merchandise is sensitized by coating with zinc oxide and by other means in order to import photo-conductive properties to it and that the resultant sensitized paper is used as the electrophotographic master or matrix in a xerographic photocopy machine. It is plaintiff's position that the process of xerography is considered to the photography.

Defendant's position is that xerography is not photography within the meaning of the word for tariff schedule purposes. It also states that issues of fact remain which must be resolved at trial. Alternatively, it cross-moves for summary judgment.

A review of the record before the court indicates that there are material issues of fact in issue that remain to be resolved on a trial on the merits and that summary judgment should be denied to

both parties. *S. S. Kresge Co.* v. *United States,* 77 Cust. Ct. 154, C.R.D. 76–6 (1976); *Carson M. Simon & Co.* v. *United States,* 3 CIT 4 (1982).

Summary judgment is a drastic remedy which precludes the parties from exercising their right to present evidence to the court on a full trial on the merits. *Donnelly* v. *Guion,* 467 F.2d 290 (2d Cir. 1972). When deciding summary judgment motions the court should resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought. *United States* v. *Diebold, Inc.,* 369 U.S. 654, 655 (1982); *S. S. Kresge Co.* v. *United States, supra,* at 157. Whether the parties seek summary judgment on cross-motions is of no consequence. Such cross-motions do not warrant a grant of summary judgment unless one of the moving parties is entitled to judgment as a matter of law upon facts as to which there is no genuine dispute. *Painton & Co.* v. *Bourns, Inc.,* 442 F.2d 216 (2d Cir. 1971). The function of the court on summary judgment motions is fact finding and not fact determination. The court cannot try issues of fact on a summary judgment motion, it can only determine whether there are factual issues to be tried. *Carson M. Simon & Co.* v. *United States, supra,* at 6.

In the instant action, the court is asked to grant judgment to the plaintiff on the basis of one affidavit by an employee of plaintiff who was involved in the research and development of the imported merchandise and who states that it is his belief that the xerographic process is a photographic process. Attached are excerpts from various books and encyclopedias which tend to support plaintiff's position.

Defendant cites other authorities which differentiate between xerography and photography. The court cannot determine from the proof presented whether the xerographic process is a photographic process. Additionally, defendant has raised the issue as to whether the imported merchandise comports with other criteria required to be satisfied for classification under the claimed item, TSUS.

Accordingly, plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment are, in all respects, denied.

Decisions of the United States Court of International Trade

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *November 4, 1983.*

The following abstracts of decisions of the United States Court of International Trade at New York are published for the information and guidance of officers of the Customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary here given will be of assistance to Customs officials in easily locating cases and tracing important facts.

WILLIAM VON RAAB,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Item No. and Rate	Item No. and Rate		
P83/336	Ford, J. October 27, 1983	Robert D. Lewis Corp.	82-1-00082	Item 389.62 15%+25¢ per lb. Dutiable on basis of export value at various invoiced unit prices plus 50%, packed	Item 706.24 20% Dutiable on basis of export value at invoiced unit values, net packed	U.S. v. J. E. Mamiye & Sons, No. 81-6 aff'd 11/19/81	Newark (New York) Styles 1712, 6433, 6433P, 1066, 1132 and 1133
P83/337	Landis, J. October 27, 1983	Matsushita Industrial Co.	82-6-00862	Item 685.90 Not stated	Item 685.19 Not stated	Judgment on the pleadings	Chicago Not stated

P83/338	Boe, J. October 27, 1983	Leisurecraft Products, Ltd.	81-3-00266	Item 715.05 Various rates (modules) Item 720.24 or 720.28 Various rates (cases) Item 740.35 Various rates (bands)	Item 688.36 5.5%, 5.3%, 5.1% or 4.9% (merchandise marked "A") Item 656.25 25%, 23.1%, 21.3%, 19.4% (merchandise marked "B" plated with gold) Item 657.35 .6¢ per lb. +7.5%, 7.4%, 7% or 6.7% (merchandise marked "B" brass) Item 657.20 9.5%, 9%, 8.6% or 8.1% (merchandise marked "B" steel) Item 656.20 16%, 14.9%, 13.9% or 12.8% (merchandise marked "B" coated or plated with palladium)	Agreed statement of facts	New York Electronic LCD watches consisting of modules; modules and cases, etc. (merchandise marked "A"); cases and bands (merchandise marked "B"); entireties

Decisions of the United States Court of International Trade

Abstracts

Abstracted Reappraisement Decisions

Decision Number	Judge and Date of Decision	Plaintiff	Court No.	Basis of Valuation	Held Value	Basis	Port of Entry and Merchandise
R83/688	Re, C.J. October 27, 1983	Jantzen Inc.	73-5-01176	Export value	Appraised values specified on entry papers by liquidating officer less additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Longview (Seattle) Clothes and textile
R83/689	Re, C.J. October 27, 1983	S. S. Kresge Co.	73-11-03188	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Savannah Wearing apparel
R83/690	Re, C.J. October 27, 1983	United Merchants & Mfrs. Inc.	74-9-02436	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739)	Charleston Wearing apparel, etc.
R83/691	Re, C.J. October 27, 1983	Vanetta Fabrics Corp.	78-7-01336, etc.	Export value	Appraised values shown on entry papers less additions included to reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739	New York Not stated

Decision Number	Judge and Date of Decision	Plaintiff	Court No.	Basis of Valuation	Held Value	Basis	Port of Entry and Merchandise
R83/692	Re, C.J. October 27, 1983	Washington Quilt Co.	73-6-01544	Export value	Appraised values specified on entry papers by liquidating officer, less any additions included which reflect currency revaluation	C.B.S. Imports Corp. v. U.S. (C.D. 4739	Seattle Sleepoing bags, etc.
R83/693	Landis, J. October 27, 1983	Amjet Industries Inc.	82-7-00990	Constructed value	Appraised values except $.04396 per pair used as figure for transportation of U.S. components from point of export to assembler's in lieu of transportation figure used by customs in calculating appraised values	Agreed statement of facts	San Juan Footwear uppers
R83/694	Landis, J. October 27, 1983	B & K Machinery Div., Hawker Siddeley Canada, Inc.	82-7-00980	Transaction value deductive value for (entry 404080 of 12/2/80	Invoiced prices less any statutorily nondutiable charges (all entries)	Agreed statement of facts	Buffalo Machinery
R83/695	Landis, J. October 27, 1983	Perkin Elmer Corp.	80-9-01520	Export value	Invoice unit prices net, packed or invoice unit prices plus percentages or additions for packing representing correct dutiable values; said prices represent exporter's list prices less 35% discount	Agreed statement of facts	New York Various electical instruments and accessories
R83/696	Landis, J. October 27, 1983	RCA Picture Tube Division	80-9-01482	Cost of production	Invoice unit values less any non-dutiable charges included therein	Agreed statement of facts	Laredo (Houston) Color picture tube mounts

Appeal to U.S. Court of Appeals for the Federal Circuit

APPEAL No. 83-1078—Goldsmith & Eggleton, Inc. *v.* United States—CERTAIN COUNTERVAILING AND ANTIDUMPING DUTY ASSESSMENTS—ITC ANTIDUMPING DETERMINATION—Appeal from Slip Op. 83-23, Dismissed; on Appelant's Motion to Dismiss, dated August 18, 1983.

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